

# Structural Remedies in Competition Cases Under the Federal Trade Commission Act\*

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A competition case typically involves two phases—a decision on the merits, and a decision on the remedy. These phases are of equal importance. Both must be resolved satisfactorily before a lawsuit will achieve a practical effect on consumer welfare. The Supreme Court has underscored this point on a number of occasions:

The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. "A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If the decree accomplishes less than that, the Government has won a lawsuit and lost a cause."<sup>1</sup>

In designing effective relief the Federal Trade Commission (Commission) can choose from either of two general approaches. It may adopt either conduct remedies or structural remedies. The first of these types—the conduct remedies—are primarily injunctive in nature. They identify specific practices that have violated the antitrust laws, forbid their repetition, and enforce the order with the threat of an action for contempt. Conduct remedies tend to be limited and safe. Common examples of such relief include injunctions against the use of territorial restraints, exclusive-dealing contracts, or price-fixing. Structural relief, on the other hand, deals with these kinds of problems in an entirely different way. Rather than forbidding certain types of behavior directly, it instead alters the organizational form of an industry through such devices as divestiture or the breakup of a single firm into separate and independent competing entities.<sup>2</sup> These changes are intended to increase the number of actors in a given industry, so that competitive processes will improve the industry's performance and will make specific conduct injunctions unnecessary. Structural relief is more sweeping than a conduct order but holds out the promise of correspondingly more effective results.<sup>3</sup>

Despite some apparently attractive features, however, structural remedies have thus far not been used with great frequency. The reasons for this judicial hesitancy are not hard to find. The antitrust statutes do not preclude structural relief, but neither do they authorize it with the kind of clarity and precision that would assure a judge he is doing the proper thing. This is particularly true of the Federal Trade Commission Act (FTC Act).

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1. *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 323-24 (1961), quoting *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947). See also *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962).

2. Structural relief can be understood as including the divestiture of certain legal rights as well as of entire organizational units. Thus, compulsory patent or trademark licensing, for example, might be defined as forms of structural relief. This option will be briefly discussed below, but it is generally outside the scope of this article. The principal focus will be on the remedies that directly affect corporate organization.

3. For a background discussion of the subject, see Oppenheim, *Divestiture as a Remedy Under the Federal Antitrust Laws (Economic Background)*, 19 GEO. WASH. L. REV. 119 (1950).

The remedial provisions of section 5 of that Act, like the substantive ones, are brief and general:

If upon such hearing the Commission shall be of the opinion that the method of competition . . . in question is prohibited by . . . this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue . . . an order requiring such persons, partnership, or corporation to cease and desist from using such method of competition . . . .<sup>4</sup>

It will be observed that the Commission's remedial authority is framed solely in terms of a power to issue "cease and desist" orders. This formulation tends to create two obstacles to the use of structural remedies. First, the language most naturally suggests reliance on conduct injunctions as at least the preferred form of remedy. Second, the language gives no guidance with respect to the proper form of whatever structural remedies might be called for and, by introducing this uncertainty, tends to discourage their use.

In combination these difficulties mean that the role of structural relief must be determined from a review of the case law and its associated literature, rather than being ascertainable directly from the statute. This article is intended to present such a review. Its discussion will be divided into seven principal sections. The first four of these examine the current status of the law: The first section takes up the threshold question that was alluded to above, and asks whether section 5's reference to "cease and desist" orders will authorize the use of structural remedies at all. It concludes that such remedies are permissible. The second section then reviews the case law and identifies the specific economic and business circumstances in which structural remedies have been held to be appropriate. This review is confined to established law and does not attempt to formulate new theories. The third section examines the circumstances in which structural relief has been held to be inappropriate. The final pages of this section attempt to harmonize the various cases holding for and against structural relief. The fourth section makes a brief historical detour, examining one unarticulated reason for the relative paucity of structural cases. It suggests that courts have, to an unwarranted degree, tended to think of corporations as legal "persons," endowed in the same manner as individuals with the right to continued and undisturbed existence.

The remaining sections of the paper consider possible extensions and refinements of the law: The fifth section takes up the basic policy question of whether a wider use of structural remedies would be desirable. This discussion focuses primarily on the economic literature and considers whether important business efficiencies would be lost as a result of a deconcentration policy. The discussion summarizes the major arguments

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4. 15 U.S.C. § 45(b) (Supp. I 1977).

that have been made on this issue, but, due to their complexity, does not attempt to resolve them. Assuming that some further use of structural relief appears desirable, the sixth section then examines one theory by which such an extension can be made. It begins by identifying new structural theories of liability, such as the no-fault and certain exclusionary-practice approaches, and then suggests that only a structural remedy could address the essential elements of those offenses. In connection with this inquiry it considers whether structural theories of liability can properly be reached under section 5's prohibition against unfair "methods" of competition. Finally, the seventh section considers a somewhat more complicated set of theories. These relate to the use of structural remedies, rather than conduct remedies, in correcting certain types of violations that had turned solely on improper conduct. Such an approach is based on the theory that conduct remedies would be too easily evaded in at least the context of oligopolistic industries.

### I. ARE STRUCTURAL REMEDIES AUTHORIZED UNDER SECTION 5?

The threshold question is in some senses the most difficult one of all. That question is whether section 5, by authorizing the Commission to issue "cease and desist" orders, also implicitly authorizes the use of structural remedies in any form. It is neither intuitively nor linguistically obvious that it does, and the original legislative history provides little support for such a construction. Nevertheless, the subsequent case law has clearly established the Commission's authority to impose divestiture and other affirmative requirements. This position was not reached at once. It emerged instead over a period of years, in response to a growing recognition that Congress must have intended to entrust regulatory agencies with the power necessary to achieve their congressionally-mandated objectives.

#### A. *Legislative History*

This outcome was not made explicit by the initial floor debates on section 5. Those debates are generally lacking in any discussion of the Commission's remedial powers. The principal concern of Congress was the definition and the substantive reach of the prohibition against "unfair methods of competition," rather than the corrective actions that might ultimately be taken. To the extent that the Commission's remedial powers were alluded to, however, they were described in terms that went no further than the letter of the statute.

Thus those powers were described in words that were essentially paraphrases of "cease and desist." Senator Newlands, the principal sponsor of the FTC Act, described the agency's procedures in the following way:

Unfair competition is made unlawful, and the Commission is authorized, when any case of unfair practice or unfair method is brought to its attention,

to summon the party charged and to have a hearing, and if it decides that the practice or method is unfair, to issue an order compelling its discontinuance . . . .<sup>5</sup>

Senator Sutherland, one of the leading opponents of the bill, described its operation in similar terms:

[U]nder this proposed bill when the Commission determines that unfair competition or unfair methods of competition exist it issues an order which, in form, is an injunction, a thing which only a court can issue; and if that is not obeyed by the corporation enjoined, application is made to the court, and that court, so far as this bill is concerned, in a perfectly perfunctory manner, itself issues a real injunction . . . . If the order of the Commission has not been complied with, the Court is authorized to issue a real injunction, and that is all there is to it. . . . The trade commission, if it acts under that clause [section 5], is not making a rule or a law within this primary standard, but it is declaring when it acts that somebody has violated the law, and it is proceeding to render judgment that the violator shall be restrained and enjoined from those acts which constitute a violation of the law.<sup>6</sup>

Senator Works, another opponent of the bill, stated that it would give the agency the power "to try the question whether a corporation or association has been guilty of what it has determined to be unfair competition, and render a decree, or an order in the nature of a decree of injunction, forbidding the corporation to continue the practice."<sup>7</sup>

Not only did the legislators omit all reference to divestiture powers in section 5, but they may have adopted an economic rationale for the FTC Act that would have made such powers unnecessary. The final report of the House Conference Committee, for example, contained the following explanation: "It is now generally recognized that the only effective means of establishing and maintaining monopoly, where there is no control of a natural resource as[or?] of transportation, is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition."<sup>8</sup> If monopoly cannot be maintained in the absence of improper conduct, in other words, then conduct injunctions will be sufficient to cure any problems that are identified, and the more innovative structural remedies would not have to be considered.

One Senator went somewhat further than this. He not only omitted all reference to divestiture powers, but expressly questioned their existence:

5. 51 CONG. REC. 11084 (1914) (remarks of Sen. Newlands).

6. *Id.* at 12815 (1914) (remarks of Sen. Sutherland). The context of these remarks reduces their force to some extent. Senator Sutherland was primarily concerned about the uncertainty of § 5 and its lack of clear substantive standards, and feared that judicial review would not provide an adequate safeguard against abuse if the courts were directed to enforce Commission orders automatically. *See id.* at 12816 (1914) (remarks of Sen. Sutherland). Still, it seems significant that he expressed this concern only by reference to situations concerning simple injunctions.

7. *Id.* at 12276 (1914) (remarks of Sen. Works). *See also id.* at 12147, 12149 (1914) (remarks of Sen. Hollis).

8. H. R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 18-19 (1914), *reprinted in* 51 CONG. REC. 14924 (1914). *See also* 51 CONG. REC. 11455 (1914) (remarks of Sen. Cummins). This point is developed in greater detail in the text accompanying notes 249-54 *infra*.

What does the Senator from Nevada [Mr. Newlands] propose to do with this bill? What is the trust remedy he proposes? Why, as I said a moment ago, it is only to nibble at one side of the trust. It is simply to reach the matter of unfair competition. Suppress that, and you have accomplished the whole thing, according to the idea of the Senator from Nevada. You still leave the monopoly; you still leave it in all force and power, as it has been able to form itself under the corporation laws of the several States. All you can do, taking all that is claimed for Section 5, is that you can suppress unfair competition; but in all other respects the octopus, the monopoly, remains a living being to plague the American people.<sup>9</sup>

It is not wholly clear how much weight should be given to these remarks. Senator Nelson was not one of the main participants in the debates on the FTC Act, and so may not have been particularly knowledgeable about its purposes. Although his remarks were consistent with the view of some legislators that the Justice Department and the FTC should exercise complementary functions,<sup>10</sup> they were inconsistent with the alternative viewpoint that the FTC should have jurisdiction over all trade offenses,<sup>11</sup> and they would have created such a degree of jurisdictional confusion that the Supreme Court has since concluded that this could not have been the legislative intent.<sup>12</sup>

None of these passages—with the possible exception of Senator Nelson's comments—purported to give a comprehensive description of the Commission's remedial powers. Thus, by omitting all reference to structural relief, Congress did not necessarily foreclose the possibility of it. It is still noteworthy, however, that none of the speakers saw fit to mention that possibility in express terms. At the very least this would indicate that divestiture remedies did not loom particularly large in the minds of the bill's sponsors.

This omission is particularly striking inasmuch as Congress was able to confer divestiture powers with great particularity when it wished to do so. Two unsuccessful amendments to the House version of the FTC Act would have done precisely that.<sup>13</sup> Section 11 of the Clayton Act, moreover,

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9. *Id.* at 12031 (remarks of Sen. Nelson). *See also id.* at 11597 (remarks of Sen. Borah).

10. *See, e.g.*, 51 CONG. REC. 12129 (1914) (remarks of Sen. Newlands).

11. *Id.* at 11112 (1914) (remarks of Sen. Newlands).

12. *See* FTC v. Cement Inst., 333 U.S. 683 (1948) ("We can conceive of no greater obstacle this Court could create to the fulfillment of these congressional purposes than to inject into every Trade Commission proceeding brought under § 5 and into every Sherman Act suit brought by the Justice Department a possible jurisdictional question." *Id.* at 693).

13. A substitute bill introduced by Congressman Murdock (H.R. 9301) would have authorized the Commission to issue an order to a monopolizing corporation "specifying such changes in the concern as would promptly terminate that monopolistic power." *Id.* at 8978 (remarks of Rep. Murdock). An amendment to the House bill proposed by Congressman Lafferty would have authorized the Commission to "issue and serve upon such corporation or association a written order . . . specifying such changes in the organization, conduct, or management of its property and business as in the opinion of the commission will most effectively and promptly terminate such monopolistic power . . ." H.R. REP. NO. 533, 63d Cong., 2d Sess., Part 3, app. 20 (1914). This failure of both these amendments is significant but not dispositive of the question of the existence of divestiture powers in § 5. Both were introduced at a time when the House bill contemplated a Commission with powers limited to those of investigation and publicity, rather than one possessing

which was enacted less than three weeks after the FTC Act,<sup>14</sup> also contains explicit terms relating to divestiture. It provides that after proof of certain Clayton Act violations, including unlawful stock acquisitions as defined by section 7, the Commission is to order the offending corporation "to cease and desist from such violation and to divest itself of the stock [acquired in violation of section 7]."<sup>15</sup> More modern statutes are often equally explicit. Thus, for example, in the Public Utility Holding Company Act of 1935, Congress directed the Securities and Exchange Commission to order certain divestitures of utility holding companies. This was accomplished not by utilization of cease and desist language, but rather by granting the broader power "to take such action as the Commission shall find necessary to limit the operations of the holding-company system . . . to a single integrated public-utility system . . . ."<sup>16</sup>

There is, however, a plausible explanation for the failure to refer specifically to divestiture powers in section 5. Under the jurisprudence of 1914, it appeared that monopolies could be broken up using statutes that did not specifically name that remedy. The Sherman Act, for example, empowered courts only to "prevent and restrain" violations.<sup>17</sup> Yet by the time the FTC Act was passed, divestiture was an established remedy under this statute. Seven monopolies had already been broken up.<sup>18</sup> Congress may therefore have concluded that cease and desist orders were wholly sufficient to deal with the monopoly problem. Orders under that kind of language had, in fact, and as a practical matter, brought divestitures about.

Why then did Congress spell out the divestiture remedy in the Clayton Act, when it failed to do so in section 5? This may be attributable to nothing more than the different scope of the two statutes. Section 7 of the

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substantive authority of any kind. See 51 CONG. REC. 8980 (1914) (remarks of Rep. Talcott); *id.* at 8985 (remarks of Rep. Montague). Since the amendments thus departed radically from the bill then under consideration, it is easy to see why they were rejected. It does not follow that they would have been rejected after the House had accepted the substantive terms of § 5. Moreover, at least in the case of Congressman Murdock, the proposal represented a policy of the insurgent Progressive Party that may have been voted down by members of the two established parties precisely because of its origins.

14. Because of the temporal proximity of these two statutes, and their closely related purposes, it has frequently been held that they should be construed *in pari materia*. See, e.g., *United States v. American Building Maintenance Indus.*, 422 U.S. 271, 277 (1975); *FTC v. Reed*, 243 F.2d 308, 309 (7th Cir.), *cert. denied*, 355 U.S. 823 (1957).

15. 15 U.S.C. § 21(b) (1976). On the other hand, two considerations tend to diminish the significance of this comparison. First, divestiture is the natural remedy in the case of improper acquisitions, and so can be specified with some confidence, whereas it would be appropriate only for some § 5 violations and thus need not be particularly named. Second, the Clayton and FTC Acts were drafted in different committees of Congress, and so their divergent wording may reflect only the styles of different authors rather than a substantive difference of intent. For a general description of the origins of these bills, see A. STONE, *ECONOMIC REGULATION AND THE PUBLIC INTEREST* 47-51 (1977). For a general discussion of the Commission's divestiture powers under § 7 of the Clayton Act, see Dougherty & Davidson, *Limitation Without Regulation: The Federal Trade Commission Staff Approach to Conglomerate Merger*, 1980 UTAH L. REV. \_\_\_\_.

16. 15 U.S.C. § 79k (b) (1) (Supp. I 1977). This statute, however, like the Clayton Act, might be distinguished as one that contemplates divestiture as the presumptive remedy.

17. 15 U.S.C. § 4 (Supp. I 1977).

18. These are enumerated in REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS 353-57 (1955).

Clayton Act is specific, and deals only with mergers. Divestiture is the obvious remedy for an improper merger and so it can be specified in the statute with reasonable confidence. Section 5, on the other hand, prohibits a wide range of improper conduct. Different forms of unfair competition will call for widely different remedies and so it would not have been practical to specify any one of them in the statute. The remedial powers of the Commission would have to have a flexibility comparable to that found in its substantive powers.

### B. *Judicial Interpretations*

It is against this background that the question of the Commission's power to order structural relief was presented to the courts. The first attempt was not propitious. That occurred in the case of *FTC v. Eastman Kodak Co.*<sup>19</sup> In that case the Commission had sued the company to challenge the anticompetitive acquisition of three film-processing plants. The challenge was brought under section 5, rather than under section 7 of the Clayton Act, because at that time section 7 did not apply to the acquisition of assets.<sup>20</sup> The Supreme Court held, however, that section 5 contained no divestiture powers:

The proceeding before the Commission was instituted under § 5 of the Federal Trade Commission Act, and its authority did not go beyond the provisions of that section. By these the Commission is empowered to prevent the using of "unfair methods of competition" in interstate and foreign commerce, and, if it finds that "any unfair method of competition" is being used, to issue an order requiring the offender "to cease and desist from using such method of competition." The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. It has not been delegated the authority of a court of equity . . . . So here the Commission had no authority to require that the company divest itself of the ownership of the laboratories which it had acquired prior to any action by the Commission. If the ownership or maintenance of these laboratories has produced any unlawful status, the remedy must be administered by the courts in appropriate proceedings therein instituted.<sup>21</sup>

The Supreme Court had held, in short, that the "cease and desist" authority did not confer the kind of equitable powers that were required for structural relief.

Matters remained in this posture for the next thirty-five years. The Commission evidently accepted the Supreme Court's interpretation, and thereafter conducted its affairs on the assumption that it had no divestiture powers under section 5. Indeed, on a number of occasions the agency expressly recognized this limitation on its authority.<sup>22</sup>

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19. 274 U.S. 619 (1927).

20. This had been established the previous term in *FTC v. Western Meat Co.*, 272 U.S. 554 (1926).

21. 274 U.S. at 623 (citations omitted).

22. See, e.g., [1927] FTC ANN. REP. 67.



The *Kodak* decision has now been abandoned, however. The change to a new perspective began as early as the 1941 decision in *NLRB v. Express Publishing Co.*,<sup>23</sup> in which the Court held that "cease and desist" powers could be used as the basis for flexible affirmative requirements. The new perspective was then applied to certain corporate mergers in *Gilbertville Trucking Co. v. United States*.<sup>24</sup> That case arose when the Interstate Commerce Commission investigated the relationships between two motor carriers. It found that, while the carriers remained nominally separate, they were so closely bound by informal family ties that they were merged for all practical purposes. Such mergers were forbidden by section 5(4) of the Interstate Commerce Act. The Commission therefore ordered divestiture, and the Supreme Court upheld the decision: "There is little question that divestiture is within the scope of the Commission's power since, with respect to a § 5(4) violation, it may order any party to 'take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation.'"<sup>25</sup> The ICC's authority "to prevent continuance of such violation" amounts to much the same thing as section 5's authorization to issue "cease and desist" orders. In neither case does the statutory language spell out an authority to order divestiture or to impose other affirmative requirements, but the Court was willing to read this power into the former statute. It seemed only a matter of time before a similar construction was put on the latter.

Another step was taken early the following year, in *Pan American World Airways, Inc. v. United States (Panagra)*.<sup>26</sup> In this case the Justice Department had sued both Pan American and W. R. Grace & Co. It charged that their joint operation of a subsidiary airline—Panagra—constituted both a division of markets and an act of monopolization. The Supreme Court ordered a dismissal of the complaint, holding that supervision of airline routes and territories was entrusted exclusively to the Civil Aeronautics Board.<sup>27</sup> As part of its duties the CAB was to prevent "unfair" competitive practices among carriers, including unfair horizontal agreements. Since the agency was thus empowered to terminate the joint venture if the public interest so required, the conventional antitrust laws were to that extent displaced. In reaching this conclusion the Court had first to determine that the CAB actually possessed effective divestiture powers. It found little difficulty in doing so, despite the fact that the CAB's authority, like that of the Federal Trade Commission,<sup>28</sup> was limited to the issuance of cease and desist orders:

It is suggested that the power of the Board to issue a "cease and desist" order is

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23. 312 U.S. 426 (1941).

24. 371 U.S. 115 (1962).

25. *Id.* at 129 (citation omitted).

26. 371 U.S. 296 (1963).

27. *Id.* at 309-10.

28. The analogy between the two regulatory statutes is even closer than this particular point of

not broad enough to include the power to compel divestiture and that in any event its power to do so under § 411 runs solely to air carriers, not to common carriers or other stockholders. We do not read the Act so restrictively. The Board has no power to award damages or to bring criminal prosecutions. Nor does it, as already noted, have jurisdiction over every violation by air carriers. But where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand.<sup>29</sup>

This language was clearly based upon a very different perspective of the law from that which underlay the *Kodak* decision. *Kodak* had turned on a conceptualized and academic distinction between statutory and equitable authority, whereas *Panagra* was based on a more practical recognition of the powers necessary to make an agency function effectively. One might wonder why this change in outlook has come about. It appears that the explanation lies in the changing canons of statutory construction. In the 1920s, it was evidently the practice to give great weight to the literal terms of the statute. By the 1960s, on the other hand, this approach had come to appear stilted and artificial. The statutes seemed best interpreted in light of the ultimate goals that Congress intended to achieve. Subsidiary terms could then be construed in a manner that would make the overall statutory scheme function more effectively. This method of construction is in no sense manipulative. It is merely to say that divestiture is sometimes the best means that the Commission will have for discharging its broad substantive jurisdiction. Divestiture is the best means of carrying out the congressional intent and, as a result, it presumably *was* a part of the intent.

This approach to statutory construction is not limited to the FTC Act. It is a basic tenet of administrative law in general. The *Panagra* Court was well aware of that, and cited precedents drawn from throughout the field of administrative law:

We have heretofore analogized the power of administrative agencies to fashion appropriate relief to the power of courts to fashion Sherman Act decrees. *Federal Trade Comm'n v. Mandel Bros.*, 359 U.S. 385, 392-393. Authority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees (*Labor Board v. Express Pub. Co.*, 312 U.S. 426, 433, 436; *Labor Board v. Cheney Lumber Co.*, 327 U.S. 385) subject of course to judicial review. Dissolution of unlawful combinations, when based on appropriate findings, is an historic remedy in the antitrust field, even though not expressly authorized. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189. Likewise, the power to order divestiture need not be

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overlap would suggest. The relevant section of the Federal Aviation Act was modeled directly on § 5 of the FTC Act. It authorizes the CAB to prohibit "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." Federal Aviation Act § 411, 49 U.S.C. § 1381 (Supp. I 1977). For this reason the Court noted that "[w]e may profitably look to judicial interpretation of § 5 as an aid in the resolution of . . . questions raised . . . under § 411," 371 U.S. at 303, quoting *American Airlines v. North Am. Airlines*, 351 U.S. 79, 82 (1955).

29. 371 U.S. at 311-12.

explicitly included in the powers of an administrative agency to be part of its arsenal of authority, as we held only the other day in *Gilbertville Trucking Co. v. United States*. Cf. *Federal Trade Commission v. Eastman Kodak Co.*, 274 U.S. 619.<sup>30</sup>

While the Court did not expressly overrule the *Kodak* case, relegation of the case to "Cf." status clearly pointed in that direction.

Since the *Panagra* decision was announced there have been a number of attempts to construe it narrowly and restrict its scope.<sup>31</sup> These efforts have generally begun with the observation that the CAB enforces a comprehensive regulatory scheme, one that governs many aspects of fares, service, and other matters that would ordinarily be within the discretion of individual businessmen. The FTC, by contrast, merely prohibits certain business practices without specifically requiring others. In order to implement its more comprehensive scheme, the CAB needs an equally comprehensive set of remedies and sanctions, ranging from mild penalties through full divestiture. Thus, the argument concludes, the differing roles of the two agencies will require that their "cease and desist" powers be construed in different ways.

This argument finds some support in the *Panagra* decision itself. The Court was certainly aware of the regulatory context contemplated by the Federal Aviation Act, and this awareness colors the entire opinion. At one point, for example, the Court observed that the words "unfair methods of competition," as used in that Act, "gather meaning from the context of that particular regulatory measure and the type of competitive regime which it visualizes."<sup>32</sup> At another point, more significantly, the regulatory context was used to qualify the Court's basic holding on the existence of divestiture power. "It seems clear that such power exists," the Court said, "at least with respect to the particular problems involved in this case."<sup>33</sup>

Upon closer examination, however, these passages do not appear to affect the actual holding of the case. Both were dealing with collateral matters. The first passage, which construed the CAB's powers over "unfair methods of competition," was concerned with that agency's substantive rather than its remedial powers. Those powers were obviously an integral part of the regulatory scheme as a whole—and so had to be interpreted with an eye on the other substantive provisions of the Federal Aviation Act—but the remedial section stands alone and is affected by its context to a far lesser extent. The second passage is still less relevant. The restriction of the holding to the "particular problems" treated in the case should be read in conjunction with the immediately preceding paragraph, in which

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30. 371 U.S. at 312 n.17.

31. These efforts have most often been made by respondents to § 5 actions. See also P. AREEDA, ANTITRUST ANALYSIS 66 & n.189 (1974) (CAB's statutory mandate "exceeds the FTC's 'merely' concurrent responsibility for the antitrust laws. . . . 'Cease and desist' need not have same scope for FTC and CAB").

32. 371 U.S. at 308.

33. *Id.* at 312.

the Court had observed that the CAB did not have jurisdiction over all possible antitrust violations.<sup>34</sup> Some violations, such as those leading to civil damages or criminal liability, would have to be prosecuted in other forums. Thus the "particular problems" to which divestiture was limited were those over which the CAB had jurisdiction in the first place, and not merely those in which a particular type of regulatory environment was imposed. As a result, the basic holding of *Panagra* would appear to stand unimpaired. When an agency's charter includes the power to issue "cease and desist orders," this grant also includes such other remedial powers as may be necessary to enable the agency "to deal with the evil at hand."<sup>35</sup>

This broad reading of *Panagra* was confirmed by later cases. Two Supreme Court decisions bear special mention, since they marked the progressive erosion of the *Kodak* case. In the first of these, the Court acknowledged the presence of contrary and possibly stronger authority.<sup>36</sup> In the second case, the circle was finally closed—the Court observed tersely that *Kodak* "has been repudiated."<sup>37</sup> Drawing on this developing authority, the Commission has held in a number of its own decisions that it possesses divestiture authority under section 5.<sup>38</sup>

The cases discussed up until this point have been encouraging, but they would be direct precedents for only a narrow range of factual circumstances. All have concerned mergers, acquisitions, and the divestiture of acquired assets. It might therefore be thought that the legal

34. *Id.* at 311-12.

35. *Id.* at 312.

36. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). The Court's opinion reads in part as follows:

In *Federal Trade v. Eastman Kodak Co.*, 274 U.S. 619, the Court . . . held that the Commission had no power to order divestiture in § 5 proceedings. But cf. *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-131; *Pan American World Airways v. United States*, 371 U.S. 296, 312, and n.17.

*Id.* at 340 n.17. An earlier passage in this footnote has sometimes been read as casting some doubt on the *Panagra* decision. There the Court referred to "Congress' evident refusal to confer upon the FTC the ordinary powers of a court of equity . . ." *Id.* at 339 n.17. For two reasons, however, this language casts no doubts. First, the context makes it clear that the Court was referring to the FTC's powers under the Clayton Act, rather than to its powers under § 5. Second, the lack of full equity powers is still consistent with the existence of a power to order structural relief. An agency may have to go to a court in order to enforce its subpoenas, or to have its final orders enforced, yet still be empowered to order divestiture.

37. *FTC v. Dean Foods Co.*, 384 U.S. 597, 600 n.4 (1966) (dictum). The footnote in *Dean Foods* continued with the following remarks:

It [the *Kodak* decision] held that in fashioning a final decree the Commission "exercises only the administrative functions delegated to it by the Act," and, therefore, could not order divestiture of laboratories acquired through a stock purchase. This view was rejected in *Pan American* . . . , the Court holding that "the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority," citing *Gilbertville Trucking Co.* . . .

38. See, e.g., *Ash Grove Cement Co.*, [1975] TRADE REG. REP. (CCH) ¶ 20,956, at 208 n.61 ("power to order divestiture is . . . clear"); *Golden Grain Macaroni Co.*, 78 F.T.C. 63, 178 (1971), modified, 472 F.2d 882 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); *Beatrice Foods Co.*, 67 F.T.C. 473, 726-27 (1965); *Ekco Products*, 65 F.T.C. 1163, 1213 (1964) ("[T]he Commission has been given in Section 5(b) a complete array of essentially equitable remedies, including divestiture and other remedies designed to effect structural reorganization."), *aff'd*, 347 F.2d 745 (7th Cir. 1965).

principle is in some way restricted to those circumstances. An order to "cease and desist" from an improper acquisition might inevitably require divestiture, for example, in a way that other forms of injunction would neither require nor justify. Thus the power of structural relief under section 5 might be in reality quite limited.

A number of additional cases make it clear, however, that section 5 structural relief can be imposed in contexts other than mergers. In one such case divestiture was ordered as a remedy to a monopolization charge, despite the fact that a conduct order, although no doubt less effective, could have addressed that situation.<sup>39</sup>

In another case a different form of structural relief—compulsory patent licensing—was sustained as a remedy for the misuse of a drug patent.<sup>40</sup> And a wide variety of consumer-protection orders, which are also based on section 5's "cease and desist" authority, have incorporated affirmative requirements for corrective advertising.<sup>41</sup> This last group of cases do not relate to structural remedies, to be sure, but they confirm that the "cease and desist" authority is not confined to the sort of negative prohibition that a too literal reading of the statutory language might suggest.<sup>42</sup>

In addition, the Federal Trade Commission structural remedy may be justified on the basis of a conservation of resources. It is certainly clear that Congress intended for the Commission to investigate trade restraints that might lead to monopoly. It is also clear that investigation of these matters would discover some situations in which monopoly had already been achieved. In those cases, Congress surely would intend for the Commission to continue and to deal with the monopoly thus found, rather than incurring the considerable inefficiency of transferring the matter to the

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39. *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971). This was not a merger case despite the fact that the divested subsidiary had once been acquired. The acquisition had taken place prior to that period to which, by stipulation, the litigation was confined. It was the secret operation of this subsidiary, *i.e.*, its role in the monopolization, and not its acquisition, that violated § 5. *See id.* at 19.

40. *American Cyanamid v. FTC*, 363 F.2d 757, 772 (6th Cir. 1966). The Commission's order was vacated and remanded on other grounds, however, and then modified. 72 F.T.C. 623 (1967), *aff'd sub nom. Chas. Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969). *See also Luria Bros. & Co. v. FTC*, 389 F.2d 847, 861, 863 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968) (sales limitation a remedy for incipient monopolization).

41. *See, e.g., Warner-Lambert, Inc. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1575 (1978) (corrective advertising in Listerine commercials). *See generally* Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 HARV. L. REV. 477 (1971).

42. One pair of cases tend to point in the opposite direction, however, if only weakly. In *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 230-31 (D.C. Cir. 1962) (Burger, J.), the D.C. Circuit enforced a divestiture order but refused to include in it a term ordering the divestiture of after-acquired assets. This was done apparently because the Commission failed to carry its burden of proof on the necessity for including such assets. *See* text accompanying notes 146-55 *infra*. A few years later, however, the Supreme Court intimated that the omission may have been due to some special limitation on the FTC's jurisdiction instead. *See Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972) (*Reynolds* "concerned the enforcement powers of the Federal Trade Commission, not the equitable powers of the District Court.") This in turn suggests that the Commission's remedies may be uniquely limited to the restoration of the *status quo ante*, and that it cannot impose more expansive affirmative requirements. Ultimately, however, it seems best not to make too much of this language in *Ford*. It is merely a brief dictum, and it evidently misconstrued the nature of *Reynolds* as a burden-of-proof case.

Department of Justice, where the investigation would have to begin afresh.

The decided section 5 cases have not yet addressed all possible theories of violation or all possible forms of structural remedy, but it is not necessary that they do so. It was enough for them to have established that structural relief is *sometimes* possible in a nonmerger action. As of that moment the dam was broken, section 5 was freed from the constraints of its literal terms, and the study of remedies under that statute merged with the larger stream of jurisprudence on structural remedies in general.

Structural relief is as appropriate a remedy under section 5 as under other statutes and, perhaps, is more appropriate. The next two sections of this article will therefore review the general law of structural relief. The following sections will then discuss changes or improvements that might be made in the customary selection of remedies. Some of these changes could be accomplished through application of existing general principles; others might depend on the Commission's ability to use its special authority under the FTC Act.

## II. WHEN STRUCTURAL RELIEF HAS BEEN HELD APPROPRIATE

The courts have already recognized a number of circumstances in which structural relief is appropriate. Those circumstances were first listed with some precision in the motion-picture cases decided by the Supreme Court in the late 1940s:

Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act.<sup>43</sup>

Later cases have modified this list and expanded upon it to some extent.<sup>44</sup> It now appears that structural relief will be authorized in five types of situations: (1) when it directly undoes a single improper act affecting the industry structure; (2) when it directly cures an essential element of an antitrust offense; (3) when it deprives the respondents of benefits they gained by their violations; (4) when it dismantles the instrumentalities used in carrying out the violation; and (5) when it may head off a demonstrated bent toward recidivism on the part of the respondents. These five bases for structural relief will be discussed in sequence.

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43. *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128-29 (1948). This passage has been cited with approval by the Court on a number of subsequent occasions. *See, e.g.*, *International Boxing Club v. United States*, 358 U.S. 242, 253 (1959).

44. For a general discussion of structural relief, and the circumstances under which it has been ordered, see O'Connor, *The Divestiture Remedy in Sherman Act § 2 Cases*, 13 HARV. J. LEGIS. 687 (1976).

### A. *Structural Relief Used to Directly Undo Improper Actions*

The first theory is the most straightforward and logically satisfying. Structural relief is appropriate when it will directly undo a single, definable act which improperly affects the industry structure. In that circumstance structural relief is not merely "appropriate," but is the presumptive form of remedy. When one wrongful act can be isolated, the contours of the violation are relatively clear and the *status quo ante* can readily be restored. Both mergers and the creation of holding-company monopolies can be analyzed in these terms.

The most frequently encountered situation of this sort is the merger. Mergers are single acts that affect, often adversely, an industry structure. Many acquisitions are ultimately found to be anticompetitive in violation of section 7 of the Clayton Act.<sup>45</sup> In those circumstances divestiture is almost invariably<sup>46</sup> decreed. This principle is best illustrated by the litigation concerning General Motors and the duPont Company.<sup>47</sup>

The *duPont* case had its origins in the period 1917 through 1919. During those years the company bought twenty-three percent of the stock of General Motors.<sup>48</sup> Thereafter it maintained a number of common officers with the automobile firm. There was some evidence that these connections were used to influence GM in the direction of purchasing its supplies from duPont.<sup>49</sup> The circumstantial evidence of this was strongest with respect to finishes and fabrics, for which duPont supplied sixty-seven and fifty-two percent of GM's requirements, respectively, in the year 1946.<sup>50</sup> These figures may not have been clear enough to establish the existence of a present restraint on competition, but they at least demonstrated a threat of preferential dealing with sufficient clarity to meet the section 7 standard of a "reasonably probable" harm to competition. DuPont's stock acquisition was therefore held to be unlawful.<sup>51</sup>

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45. In one sense mergers are not an important part of our present problem, since the Clayton Act expressly provides for the divestiture of unlawful acquisitions. See 15 U.S.C. § 21(b) (Supp. I 1977). Thus these matters can be handled without direct reliance upon the more general law of structural remedies. On the other hand, the manner in which the courts have dealt with the divestiture of acquired assets may shed some light on the principles that they will apply to structural cases of other kinds.

46. It is possible that the legal standard is even more stringent than this and will *require* a divestiture order, at least in cases where the violation has been found by an administrative agency rather than by a court. Section 11 of the Clayton Act states that the agency then "shall" issue an order requiring divestiture. 15 U.S.C. § 21(b) (Supp. I 1977). One district court has reported that administrative agencies do not always construe this language as mandatory, however, see *United States v. E.I. duPont de Nemours & Co.*, 177 F. Supp. 1, 15 (N.D. Ill. 1959), and the Supreme Court left this question open on appeal. See 366 U.S. 316, 328 n.9 (1961).

47. See *United States v. E.I. dePont de Nemours & Co.*, 366 U.S. 316 (1961).

48. The *duPont* case actually reached the Supreme Court twice—once on appeal concerning the violation, and later concerning the remedy. Although it is the decision on the remedy that is of most interest here, the facts of the case are more thoroughly set out in the first opinion. See *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586 (1956).

49. *Id.* at 603, 606-07 n.35.

50. *Id.* at 596.

51. *Id.* at 607. The Supreme Court may have adopted this basis for its decision only with some

Once the basic unlawfulness of the acquisition had been established, the Supreme Court had little difficulty in concluding that divestiture was the appropriate remedy:

It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. That statute is specific and "narrowly directed," *Standard Oil Co. v. United States*, 337 U.S. 293, 312 (1949), and it outlaws a particular form of economic control—stock acquisitions which tend to create a monopoly in any line of commerce. The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. . . . [Divestiture] should always be in the forefront of a court's mind when a violation of § 7 has been found.<sup>52</sup>

This decision is part of a consistent pattern. Many cases have similarly noted that divestiture is a particularly appropriate remedy for illegal acquisitions.<sup>53</sup> Other merger cases have not discussed the issue at all, but have simply ordered divestiture as a matter of course.<sup>54</sup> And one final case supports this viewpoint with an eloquent silence. The Supreme Court, when considering the merger between the Brown and Kinney shoe companies, gave an exhaustively detailed analysis of the legal liability. On the subject of relief, however, the Court found need for few words. It merely observed that the decree "will be an order of full divestiture."<sup>55</sup>

The same principles that govern relief in merger cases also guide the choice of remedies in the case of holding-company monopolies. These monopolies were the classic "trusts" at which the antitrust laws were first directed. They generally worked by bringing the independent firms of an industry under the common control of a single holding company. The holding company could thereafter establish uniform prices and terms of sale for the industry, but in other respects it left its subsidiaries intact as separate operating units. The act of creating such a monopoly is in many respects like the act of making an anticompetitive acquisition. It entails a single identifiable step, which, when undone, will allow the affected business entities to resume their previously competitive positions.

For this reason, structural remedies are preferred in dealing with the

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reluctance. It may have preferred, as the dissent intimated, to have found some present restraint of trade. *See id.* at 609 (Burton, J., dissenting). It was precluded from doing so by the trial court's original findings of facts, however, which concluded that no such restraint had taken place. *See* 126 F. Supp. 235, 335 (N.D. Ill. 1954). The Supreme Court therefore treated the case as one of structural potential alone.

52. 366 U.S. at 328-31 (footnotes omitted).

53. *See, e.g.,* *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1973); *United States v. El Paso Gas Co.*, 376 U.S. 651, 662 (1964); *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944).

54. *See, e.g.,* *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960); *Aluminum Co. of America v. FTC*, 284 F. 401 (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923), *modification denied*, 299 F. 361 (3d Cir. 1924). Some additional cases, which might be considered exceptions to this statement, were distinguished by the Court in *duPont*. *See* 366 U.S. at 330 n.13. Those cases involved exceptional circumstances (private actions and serial acquisitions) and so should not significantly affect the general rule.

55. *Brown Shoe, Inc. v. United States*, 370 U.S. 294, 309 (1962).



problem of holding-company monopolies. Such cases figured prominently in the early history of the Sherman Act. The best example of this may be the *Standard Oil* litigation.<sup>56</sup> This case dealt with the old Rockefeller trust, which had been put in a new guise by using Standard Oil of New Jersey as the holding company for some thirty-four major subsidiaries. The Supreme Court undid that monopoly by the simple expedient of ordering the subsidiaries to be spun back off to Standard Oil's shareholders, thus recreating their independent status.<sup>57</sup> In so ruling it set a pattern for the future. Later cases regularly ordered structural relief when holding-company monopolies were discovered.<sup>58</sup>

The dissolution of holding companies has not been confined to situations in which the subsidiaries had been subsumed without alteration. This remedy has also been used in cases where the holding company had, to some limited extent, consolidated its subsidiaries or otherwise altered their organizational form. In those cases the decree was aimed at reconstituting the industry structure to the greatest extent feasible. In one such case the district court was directed to devise "some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law."<sup>59</sup> In another case the trial court ordered divestiture "in such manner and into such number of parts of separate and distinct ownership as may be necessary to restore competitive conditions in harmony with law."<sup>60</sup>

The cases dealing with the re-creation of consolidated subsidiaries—such as those discussed above—appear to be valid precedents, but they represent a line of analysis that can be carried only a limited distance. Beyond a certain point the functional integration carried out by the holding company will have affected the business situation to such an extent that it must be counted as an intervening circumstance. Relief can then no longer be thought of as simply undoing a single act of acquisition. The problem must instead be approached as one related to an integrated monopoly, with the attendant difficulties of identifying and correcting the

56. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

57. *Id.* at 77-82. Many of those subsidiaries carried out single functions rather than being each vertically integrated. The spinoff of internally-integrated companies would have been even more clearly appropriate, since there would have been less risk of a loss of efficiency.

58. See, e.g., *United States v. Southern Pac. Co.*, 259 U.S. 214, 230, 231 (1922); *United States v. Reading Co.*, 253 U.S. 26, 57-59 (1920); *International Harvester v. Missouri*, 234 U.S. 199, 209 (1914); *United States v. Union Pac. R.R. Co.*, 226 U.S. 61, 88 (1912). These cases are discussed in *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).

59. *United States v. American Tobacco Co.*, 221 U.S. 106, 187 (1911). This case was decided only two weeks after *Standard Oil*, and the two are frequently read together. Thus it appears that the Court did not intend to differentiate between holding companies that had and had not made alterations in their subsidiaries.

60. *United States v. International Harvester Co.*, 274 U.S. 693, 696 (1927). This was one out of a number of forms of decree, both litigated and consent, that the district court adopted at various phases of the litigation. See *id.* at 696-97.

improper acts of monopolization. It is to that aspect of structural relief that the following section is devoted.

*B. Structural Relief That Cures an Essential Element of the Offense*

Structural remedies are also appropriate, as a second general category, in cases in which they directly cure an essential element of an antitrust offense. If a certain type of industry structure is an essential part of the violation, in other words, then a decree that altered the structure would directly act to cure the violation. This category is found in a slightly different kind of case from those discussed in the previous section. The cases here, like those undoing an unlawful act, deal with situations in which the underlying offense is essentially structural in nature. The structural remedy is therefore an obvious and effective solution. Unlike those cases, however, the picture now is complicated by a greater number of variables. There may be other essential elements of the offense in addition to the structural situation; there may be other methods of curing the violation that do not operate directly on any of its essential elements; and there is less clearly a "bad" act upon which stringent remedies may be predicated. As a result, the structural remedy, while always possible, is not the necessary or universal form of relief.

This category of structural relief is exemplified by one situation in particular—the monopolization case. Since monopoly involves a structural situation in terms of market share, it is particularly amenable to structural remedies. Yet, at the same time, some element of conduct must also be shown in order to make out a cause of action.<sup>61</sup> Hence conduct relief could also, in theory, be effective in curing the violation. The remainder of this section will consider the ways in which courts have utilized these two remedies in monopolization cases.<sup>62</sup>

This undertaking is not as daunting as it may at first appear to be. Monopolization cases are extremely complex and time-consuming, but their complexity relates primarily to the issue of liability rather than to that of relief. The trial on liability must grapple with such legal issues as identifying the types of conduct that will constitute improper "acts of monopolization," and with such factual issues as determining whether acts of that kind had actually taken place. Thereafter, however, the ingredients of the remedy are relatively simple.

The law of liability in monopolization cases need not detain us for long. Only a brief synopsis will be presented here by way of background.

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61. Various "no-conduct" monopoly theories have been proposed over the last decade. Under those theories the quantum of conduct that must be shown would be either reduced or else eliminated altogether. To date, however, no court has accepted such a theory. This subject will be discussed in greater detail *infra*.

62. Courts, however, have not always distinguished between the legal standards applicable to divestitures in merger and in monopoly situations. *See, e.g.,* *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (citing Sherman Act and Clayton Act cases without differentiation).

The basic offense was most recently defined by the Supreme Court in the following terms:

The offense of monopoly under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.<sup>63</sup>

The first element of the offense—possession of monopoly power—has been defined as possession of “the power to control market prices or exclude competition.”<sup>64</sup> In principle the degree of market power possessed by a particular firm should be determined after a study of the unique characteristics of its market.<sup>65</sup> In practice, however, courts have often been willing to infer market power from the evidence of a firm’s market share.<sup>66</sup> The Supreme Court in one important case remarked that a ninety percent market share “is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.”<sup>67</sup> Thus, where market share is high, the principal element in a monopolization case is ordinarily straightforward and structural.

The second element of the offense—willful acquisition or maintenance of that monopoly power—has produced greater conceptual difficulties. Three slightly different standards have been articulated at various times.<sup>68</sup> Some cases have held that an illegal act of monopolization takes place when a firm utilizes exclusionary practices that are themselves unlawful restraints of trade under the Sherman Act.<sup>69</sup> Other cases have held that the acts need not be independently illegal, so long as they were adopted as part of a conscious effort to achieve, exercise, or retain monopoly power.<sup>70</sup> A third group of cases has established a still more

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63. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

64. *Id.* at 571, *citing* *United States v. E.I. duPont de Nemours & Co. (Cellophane)*, 351 U.S. 377 (1956). *See also* *United States v. Griffith*, 334 U.S. 100, 105 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946). The ascertainment of market power must be preceded by a definition of the relevant market, which in some cases may be a difficult issue in itself. *See, e.g.*, *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956).

65. *See* *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-28 (1948). Ideally, the market study should consider such factors as the presence of other firms “in the wings,” the height of entry barriers, the availability of product substitutes, and so forth. *See generally* L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* §§ 22-32 (1977).

66. *See* ABA, *ANTITRUST LAW DEVELOPMENTS* 53-55 (1975); O'Connor, *The Divestiture Remedy in Sherman Act § 2 Cases*, 13 HARV. J. LEGIS. 687, 720 n.116 (1976).

67. *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

68. These three standards were identified and differentiated in *United States v. United Shoe Mach. Co.*, 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). The standards were formulated in a similar but slightly different way in L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* §§ 33-39 (1977).

69. *See, e.g.*, *United States v. Columbia Steel Co.*, 334 U.S. 495, 518 (1948); *United States v. Griffith*, 334 U.S. 100, 106 (1948).

70. *See, e.g.*, *United States v. Griffith*, 334 U.S. 100, 107 (1948); *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945) (alternative ground) (conduct falling short of monopoly “is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden”).

stringent standard, and has held that it is improper for a monopolist to adopt any practice that is "needlessly" exclusionary, in the sense that it disadvantages competitors more than any rational alternative business practice would do.<sup>71</sup> A case may be prosecuted under this last theory without any showing of specific intent to monopolize on the part of the respondent firm.<sup>72</sup> The courts have not always distinguished carefully among these three theories, even within the context of a single case, but that is an issue for another article. The point that concerns us now is simply that some proof of bad conduct—although perhaps only in a small and still-decreasing quantity<sup>73</sup>—is required as part of a monopolization case.

The presence of two elements in the monopolization offense means that there are, in theory, two remedial paths that might be taken. A structural remedy could be used to break up the monopoly power, or a conduct remedy could be used to enjoin the forbidden acts of monopolization. Both possibilities have been recognized from the very beginning of antitrust law. Also from the beginning, however, has been a certain preference for the structural remedy. This made its appearance as early as the decision in *Standard Oil*:

It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*, 196 U.S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies . . . [I]t follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes

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71. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 431 (2d Cir. 1945) (alternative ground); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953) ("market control is inherently evil and constitutes a violation of § 2 unless economically inevitable"), *aff'd per curiam*, 347 U.S. 521 (1954); *accord*, *Greyhound Computer Corp. v. IBM*, 559 F.2d 488, 498, 502-03 (9th Cir. 1977).

72. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945) ("no monopolist monopolizes unconscious of what he is doing"). This third group of cases therefore may not actually state a theory different from the second, but may instead be only a vehicle for dispensing with a difficult issue of proof. The *Alcoa* case, for example, can be interpreted as only the circuit court's effort to find a way around the trial court's finding, with which it disagreed, that the company had acted with no improper motives. A charge of *attempted* monopolization, on the other hand, does require a showing of specific intent. See *Swift & Co. v. United States*, 196 U.S. 375 (1905) (Holmes, J.); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 346 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). See also *Hallmark Indus. v. Reynolds Metals Co.*, 489 F.2d 8, 12 n.3 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974). Presumably, this proof is required because the respondent, being farther away from his goal, has more ambiguous intentions. Under these circumstances, moreover, with threat of actual monopoly still somewhat remote, it seems best not to needlessly discourage vigorous and innovative competition, even if that is deliberately intended to capture some of the business from a rival.

73. Some believe that this series of decisions has made it almost inevitable that objectionable conduct will be found in cases involving substantial and persistent monopoly power. See *Antitrust Symposium: Section 2 of the Sherman Act*, 10 Sw. L. Rev. 35 (1978) (articles and comments by Maxwell Blecher and Judge Charles Wyzanski).

essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.<sup>74</sup>

The preference for structural remedies has continued into the more recent cases. As part of the *Alcoa* litigation, for example, the Second Circuit summarized its order to the trial court in the following terms:

[W]e tried to make it plain that the final judgment must secure the establishment of those "competitive conditions" which the Antitrust Acts demand. Dissolution is one remedy which may be necessary to that end; and in any event it will not depend upon the single issue whether "Alcoa" at the time of the judgment shall have a monopoly of the ingot market. On the contrary, it will depend upon what is "Alcoa's" position in the industry at that time: i.e., whether it must be divided into competing units in order to conform with the law. The continuance of the monopoly in ingot aluminum may in the court's judgment be enough to justify dissolution; but its absence will forbid neither dissolution, nor any other remedy.<sup>75</sup>

It will be noted that this language refers to the alternatives of structural and conduct relief without expressly favoring either one of them over the other. The basic thrust of the passage, however, is to remove various objections that might be made against the structural remedy. Its underlying sense therefore seems to be that of encouraging the use of such remedies.

Despite their emphasis on structural remedies both these cases also held open the possibility of relying on conduct-oriented relief alone. Such a course has, in fact, been tried fairly often,<sup>76</sup> but frequently with unsatisfactory results. Divestiture may therefore remain the remedy of choice. This is best illustrated by the history of the *United Shoe Machinery*<sup>77</sup> litigation. That case arose on the government's allegation that the company held some eighty-five percent of the market for the machinery used in manufacturing shoes. The trial court held that this constituted an illegal monopoly, since the company had protected its market position by adopting a number of unnecessarily restrictive practices.<sup>78</sup> The court declined to order structural relief, however, since the respondent's single manufacturing plant was not readily divisible. Instead, it entered an

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74. 221 U.S. at 77-78.

75. *United States v. District Court*, 171 F.2d 285, 286 (2d Cir. 1948). This case arose on a mandamus action, in which the Justice Department alleged that the *Alcoa* trial court had not fully followed the Second Circuit's mandate after the principal appeal on the issue of liability. Ultimately, no structural relief was ordered, but this was due to exceptional circumstances that will be discussed in the text accompanying note 208 *infra*.

76. One commentator examined the Justice Department's 62 most recent single-firm monopolization cases, and found that substantial divestiture was ordered in only four of them. See notes 217-23 and accompanying text *infra*.

77. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

78. *Id.* at 344-45.

injunction against the restrictive practices that had constituted the acts of monopolization.<sup>79</sup> It also announced that the situation would be reviewed at the end of the ten years to determine whether this injunction had in fact had the intended effect of enabling competitors to erode the defendant's market share.

The matter was duly reviewed ten years later.<sup>80</sup> The trial court found that United Shoe Machinery's market share, while still high, had declined from eighty-five percent to approximately sixty-two percent.<sup>81</sup> The court therefore concluded that the order was working as intended and refused to modify it.<sup>82</sup> The Supreme Court reversed.<sup>83</sup> It agreed, consistently with the other cases in this area, that a remedy might properly use "means less drastic than immediate dissolution or divestiture,"<sup>84</sup> but it also held that reliance on such methods had proven insufficient in this case:

If the decree has not, after ten years, achieved its "principle objects," namely, "to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market"—the time has come to prescribe other, and if necessary more definitive, means to achieve this result. A decade is enough.<sup>85</sup>

On remand the parties finally settled the case through a consent decree, under which the defendant agreed to divest itself of assets sufficient to reduce its market share to no more than thirty-three percent.<sup>86</sup>

Thus the conduct remedy did not fare well in one of the most recent and well-documented cases in which it was used. We may anticipate that such remedies will be used more sparingly in the future than in the past. There are at least two reasons for this conclusion. The first is the discouraging precedent of the *United Shoe Machinery* case itself. The second relates to the changing role of conduct evidence in proving the underlying offense of monopolization.<sup>87</sup> The early cases required that conduct be markedly abusive before it would be characterized as an "act of monopolization."<sup>88</sup> If conduct violations of this magnitude were halted, it

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79. Thus, it purged the equipment leases of restrictive terms, *id.* at 349; required that equipment be offered for sale as well as lease, *id.* at 349-50; and required that service contracts be separately billed rather than included in the original selling price. The court also ordered divestiture of certain small subsidiary companies, *id.* at 351, but this was not an important part of the decree.

80. 266 F. Supp. 328 (D. Mass. 1967), *rev'd*, 391 U.S. 244 (1968).

81. 266 F. Supp. at 331.

82. *Id.* at 334-35.

83. 391 U.S. 244 (1968).

84. *Id.* at 250-51.

85. *Id.* at 251-52.

86. [1969] Trade Cas. ¶ 72,688 (D. Mass. 1969).

87. This point is derived from the trial court's opinion on relief in the *Alcoa* case, after remand following the Second Circuit's decision on liability. See *United States v. Aluminum Co. of America*, 91 F. Supp. 333, 342 (S.D.N.Y. 1950).

88. This is illustrated by a line of cases in which monopoly power had been unlawfully acquired, followed by a period of forbearance from abuse of that power. The abandonment of abusive conduct was held sufficient to allow the companies to escape liability. See *United States v. American Can Co.*,

could be expected that the change would have a significant effect on competition. Under the current law, however, conduct can be improper if it is merely exclusionary to some degree. Such conduct has less intrinsic importance than that which was required under the earlier standard, and so its elimination may be expected to affect the competitive situation to a correspondingly smaller extent.<sup>89</sup> Now more than ever structural remedies may have to be used in order to achieve effective relief.

The goal of the structural remedy is generally phrased in terms of restoring "workable competition" to the market. This was the standard used in *United Shoe Machinery*,<sup>90</sup> and it has also been used in a number of other cases.<sup>91</sup> The formula does not require any particular market structure or the creation of any specific number of competing firms. As a rule of thumb, however, the courts appear to be content if the decree reduces the defendant's market share to fifty percent. This number has appeared on several occasions.<sup>92</sup>

A divestiture order should not focus on market structure in static terms alone. It is not enough that the new firms be given fifty percent of the market on the day the order takes effect. They must also have the resources necessary to remain in the market as viable competitors for the future. A well-conceived structural decree will therefore give considerable attention to these matters. The best decision of this sort may be the one in *United States v. Aluminum Co. of America (Alcoa)*.<sup>93</sup> In that case the trial court exhaustively considered the relative strength of Alcoa and its competitors in terms of gross sales, production at different levels of the manufacturing process, and access to capital, raw materials, and key patents.

A structural decree may incorporate various collateral terms in order

230 F. 859 (D. Md. 1916); cf. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920) (dominant firm but not monopoly). But see *United States v. International Harvester Co.*, 214 F. 987 (D. Minn. 1914).

89. The conduct involved in the best-known recent cases may be characterized as conduct that had the effect of raising entry barriers. The lease-only policy of *United Shoe Machinery* can be understood in these terms, for example, as can Alcoa's expansion of its capacity in anticipation of industry demand. Neither practice set up a virtual bar to new competition in the same sense that sustained below-cost pricing would do. Both were held improper merely because they made it somewhat more difficult for additional firms to enter the industry.

90. 391 U.S. 244 (1968).

91. See, e.g., *United States v. International Harvester Co.*, 274 U.S. 693 (1927); *United States v. Pitney-Bowes, Inc.*, [1959] Trade Cas. ¶ 69,235, at 74,864 (D. Conn. 1959) (consent decree) ("substantial competition"); *United States v. Eastman Kodak Co.*, [1954] Trade Cas. ¶ 67,920 (W.D.N.Y. 1954) (same); *United States v. Aluminum Co. of America*, 91 F. Supp. 333, 340 (S.D.N.Y. 1950) ("effective competition").

92. See, e.g., *United States v. Aluminum Co. of America*, 91 F. Supp. 333, 359, 416-17 (S.D.N.Y. 1950) (disposal of war surplus factories to competitors had reduced defendant to "just under" 50%; no domestic divestiture ordered); *United States v. Eastman Kodak Co.*, [1954] Trade Cas. ¶ 67,920, at 70,009 (W.D.N.Y. 1954) (consent decree) (defendant to divest processing capacity in excess of 50% of market, unless effective competition otherwise shown). See also *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 127 (1948) (district court, perhaps wrongly, did not consider a plan to dissolve the defendant into three corporations); *United States v. IBM*, [1956] Trade Cas. ¶ 68,245 (S.D.N.Y. 1956) (divestiture to be ordered if conduct injunction did not bring firm's share of the tabulating-card market below 50%), *divestiture ordered*, [1963] Trade Cas. ¶ 8824.46 (S.D.N.Y. 1963).

93. 91 F. Supp. 333 (S.D.N.Y. 1950).

to ensure the viability of the divested firms. Most obviously, it may forbid the exclusionary practices that had helped to create the monopoly in the first place. In addition to this, however, the decree may contain subsidiary provisions which are themselves of a structural nature. Many of these have been devised over the years: defendants have been ordered to license their patents;<sup>94</sup> to provide know-how through consultants or operating manuals;<sup>95</sup> to restrict their sales outlets to only a single dealer in a town;<sup>96</sup> to sell equipment rather than merely lease it, thus creating a second-hand market;<sup>97</sup> and to refrain from making further acquisitions in the future, except on an affirmative showing that such acquisitions will not harm competition.<sup>98</sup>

Thus far we have discussed two general categories of structural cases—those undoing a wrongful act, which deal with mergers and holding companies; and those curing an essential element of the offense, which deal with monopolization. These are the principal areas in which structural relief has been held proper. Such relief has also been granted, however, under a few more specialized circumstances. Those will be discussed under the next three headings.

### *C. Structural Relief as a Means of Depriving Defendants of the Fruits of Their Misconduct*

Structural relief is also authorized when it will deprive a defendant of the specific benefits he has reaped from an antitrust violation:

In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. . . . [A] direct method of causing appellants to surrender the gains from their conspiracy is to require them to dispose of [properties] obtained by practices which violate the antitrust acts.<sup>99</sup>

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94. See *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945); *United States v. Pitney-Bowes, Inc.*, [1959] Trade Cas. ¶ 69,235 (D. Conn. 1959) (consent decree); *United States v. Eastman Kodak Co.*, [1954] Trade Cas. ¶ 67,920 (W.D.N.Y. 1954) (consent decree); cf. *United States v. Aluminum Co. of America*, 91 F. Supp. 333, 410 (S.D.N.Y. 1950) (company enjoined from enforcing grant-back rights on improvement patents).

95. *United States v. National Lead Co.*, 332 U.S. 319, 353-58 (1947); *United States v. Pitney-Bowes, Inc.*, [1959] Trade Cas. ¶ 69,235 (D. Conn. 1959) (consent decree); *United States v. Eastman Kodak Co.*, [1954] Trade Cas. ¶ 67,920 (W.D.N.Y. 1954) (consent decree).

96. *United States v. International Harvester Co.*, 274 U.S. 693, 706 (1927). This appeared to be an extremely effective provision, since it enabled competitors to improve their distribution systems and market penetration.

97. See *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 349-50 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *United States v. Pullman Co.*, 50 F. Supp. 123, 137 (E.D. Pa. 1943) (dictum), *aff'd by an equally divided Court*, 330 U.S. 806 (1947).

98. See, e.g., *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186-87 (1944); cf. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 428 (1945) (trade association could be reestablished only on such terms).

99. *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 128-29 (1948).



This theory of structural relief originated with the decision in the *Schine Theaters* case quoted above. The defendants in that case were three individuals and six related corporations. Together they owned 148 movie theaters, mainly located in small towns in Ohio and upstate New York.<sup>100</sup> This group negotiated as a unit with the distributors from whom they obtained films for exhibition. By using their pooled buying power—and particularly the power derived from the towns in which they owned the only theater—the defendants were able to get especially desirable films and especially favorable financial terms.<sup>101</sup> This in turn placed their competitors at a disadvantage, a disadvantage that was further compounded by the defendants' local price-cutting and other unilateral acts of predation. Through these means the defendants forced many independent theater owners to sell out to them.<sup>102</sup>

The trial court found this course of conduct to be improper in many respects. It was an abuse of the monopoly power that the defendants enjoyed in one-theater towns; it involved a conspiracy to monopolize in other towns; and it embodied various individual acts in restraint of trade.<sup>103</sup> The court therefore ordered that theaters in approximately forty towns be sold.<sup>104</sup>

The Supreme Court reversed with respect to the selection of remedy, on the theory that a remedy should focus, at least initially, on depriving a defendant of the specific fruits of his violation:

Nor do the findings reflect an inquiry to determine what theaters had been acquired by Schine through methods which violate the [Sherman] Act. So far as the findings reveal, the theatres which are ordered divested may be properties which in whole or in part were lawfully acquired; and theatres which Schine is permitted to retain may, so far as the findings reveal, be ones which it obtained as the result of tactics violating the Act. . . . The case must therefore be remanded so that the District Court may make appropriate findings on this phase of the case.<sup>105</sup>

The Court conceded that further divestiture might be needed in order to wholly eliminate the defendants' monopoly power,<sup>106</sup> but it emphasized that divestiture should begin with the identifiable fruits of the violation.<sup>107</sup>

This approach to structural relief, it should be noted, is not confined to monopolization cases. It may apparently be invoked to correct antitrust violations of any type. This is illustrated by the opening quotation of this

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100. *Id.* at 113.

101. *Id.* at 114.

102. *Id.*

103. *Id.*

104. *Id.* at 126-27.

105. *Id.* at 127-29.

106. *Id.* at 129.

107. *Id.* It may not always be possible to distinguish between monopoly power and the identifiable fruits of its exercise, however. One court has suggested that "the power itself, and not the specific elements thereof, must sometimes be viewed as the 'fruit.' " *United States v. Aluminum Co. of America*, 91 F. Supp. 333, 346 (S.D.N.Y. 1950).

section, in which the Court referred without differentiation to "monopolistic practices," "restraints of trade," and "practices which violate the antitrust acts."<sup>108</sup> Any of those things would evidently justify divestiture of the sort described in the opinion.<sup>109</sup> This reading of the decision is reinforced by the facts of the case itself. Although the defendants had monopoly power in some areas and were seeking to achieve it in others, many of their acquisitions were proximately effected by the simple means of predatory pricing. The fruits of that unfair practice, as well as the fruits of monopolization in specific markets, were to be divested.

Before deciding to rely on the "fruits" theory, however, it should be asked whether this remains a vital part of contemporary law, or whether it was instead only a transitional doctrine of the 1940s. In two respects the theory has that air of expediency that characterizes much transitional law. First, it enables the court to decree structural relief without having to address the complex economic questions related to deciding what amount of divestiture is needed in order to re-create competitive conditions. Second, by restricting divestiture to the products of the violation the theory contains an internal limiting mechanism that will prevent a court from ordering damagingly excessive divestiture in the name of "complete" relief. In short, the "fruits" theory can be viewed as a product of a time when the Supreme Court had accepted the need for a greater use of structural remedies, but had not yet become comfortable with economic analysis or confident in the lower courts' ability to apply it wisely.<sup>110</sup>

In light of these considerations, the "fruits" theory would seem best considered as only a secondary source of divestiture power. Its somewhat mechanistic approach probably does represent legal thinking at a transitional stage, and one which has now been largely displaced by economic analysis looking directly to the ultimate question of industry competitiveness. At the same time, however, the theory has an independent moral basis that has not been questioned or repudiated, and it thus remains as a legitimate option. There are likely to be cases in which its use would still be appropriate. The "fruits" theory has the great virtue of simplicity, for example. It would therefore lend itself to those relatively

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108. See text accompanying note 99 *supra*.

109. A similar conclusion may be inferred from *Schine Theaters'* companion case, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). There the Court observed that a particular ownership situation, even if of a sort not usually violating the Sherman Act, would be legally vulnerable if it had been achieved "as a result of practices which constitute unreasonable restraints of trade." *Id.* at 171. On the previous page the Court noted more specifically that divestiture might be appropriate for the fruits of an attempt to monopolize. *Id.* at 170.

110. In one respect the theory may be directly contrary to economic learning. The theory postulates that a court order of divestiture is needed in order to prevent a defendant from retaining the fruits of his violation. Chicago School economists would claim that economically-unjustified acquisitions cannot be retained in the absence of improper conduct, and once the conduct is enjoined the defendant will have to sell the fruits in any case. On the other hand, however, the defendant would presumably be able to keep at least those improperly-acquired properties which fit rationally within his business structure, and this alone may be sufficiently undesirable to require correction.

minor cases in which a full-scale economic analysis would not be justified. Such cases might examine local acquisitions, otherwise proper, that were brought about by predatory pricing, price discrimination, or various forms of exclusionary conduct.

D. *Structural Relief as a Means of Depriving Defendants of the Instrumentalities Used in the Violation*

The fourth theory of structural relief goes a step beyond divesting the fruits of a violation. It authorizes divestiture or destruction of the instrumentalities used in the offense:

The [industry trade] association has undoubtedly been an important instrument of restraint and monopoly. It may be made such again, and detection and prevention and punishment for such resumption of violations of law may be difficult if not impossible. In light of the record, we think it better to order its dissolution, and to provide that the corporate defendants be restrained for a period of five years from forming or joining any such trade association . . . .<sup>111</sup>

Although this aspect of the *Hartford-Empire* case concerned a trade association, the question of divesting the instrumentalities of violation arises most frequently with respect to patent violations.<sup>112</sup> That, in fact, was the principal subject of the case. The defendants there were nine manufacturers of automatic glassblowing machinery. They accumulated a pool of over 800 patents covering such apparatus, and manipulated the grant of licenses from this pool in such a way as to restrict production and deter new entry. The defendants were duly convicted of both conspiracy and monopolization. The Court granted, among other relief, divestiture of the assets used in carrying out this plan. It ordered the defendants to license all applicants, at reasonable royalties, with any of their existing or future patents on the kinds of glassblowing machinery involved in the suit.<sup>113</sup>

The divestiture of instrumentalities is not confined to patent cases, however. It has been found appropriate in at least two other situations as well. The first is in the case of motion-picture buying pools of the sort described in *Schine Theaters*. A companion case, *United States v. Paramount Pictures, Inc.*,<sup>114</sup> held that certain theaters could be divested on that ground: "Moreover, even if lawfully acquired, they may have been

111. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 428 (1945).

112. The nexus between patent and antitrust law is a complex subject, and one that is generally beyond the scope of this article. It will be discussed here only briefly and for the sake of completeness. The basic principle of this subject is that patents confer no absolute rights. An antitrust violation can result if they are used to restrain trade beyond the terms of the patent grant itself. See *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912).

113. This relief is conceptually a "divestiture," since the defendants are being deprived of a valuable property right—here, the right to a monopoly on manufacture for the seventeen-year term of the patent. It is true the Court rejected the idea of royalty-free licensing on the grounds that it would be confiscatory. 323 U.S. at 423-24. The resulting relief was still a divestiture, however, since any firm that is ordered to dispose of certain operations is entitled to sell them at a fair price.

114. 334 U.S. 131 (1948).

utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified."<sup>115</sup> Divestiture was also ordered in a case involving monopoly in the promotion of professional boxing championships.<sup>116</sup> In that case, two different types of instrumentalities were affected. The defendant boxing clubs were dissolved outright,<sup>117</sup> and the individual defendants were ordered to sell their stock in Madison Square Garden. "It may be that the stock in Madison Square Garden was not the fruit of the conspiracy; but even if lawfully acquired it may be utilized as part of the conspiracy to effect its ends."<sup>118</sup>

This theory will apply, in short, to a wide variety of instrumentalities. It appears that any mechanism that can be helpful in carrying out a trade restraint can also be ordered divested on that basis.

A further question then arises: How deeply involved in the violation must the instrumentality have been—how essential a role must it have played in the offense—before divestiture is appropriate? Two general principles seem to emerge from the cases. The instrumentality must have been a central and essential mechanism in the unlawful scheme before it can be reached. Once that criterion has been met, however, it is no defense to show that the instrumentality was also used (or even primarily used) for entirely legitimate purposes.

These principles are illustrated by a number of decisions. The trade association in *Hartford-Empire* was a central factor in the conspiracy, since it was through that agency that production quotas were established.<sup>119</sup> The Court thereupon ordered the association dissolved, even though it recognized that under a different injunction it might have continued as "an innocent trade association for what have been held lawful ends."<sup>120</sup> The theaters that were ordered divested in *Paramount* were essential to the violations there, since it was through theater ownership that the defendants could obtain such anticompetitive benefits as long clearances and runs.<sup>121</sup> At the same time, the basic use of the theaters was for the exhibition of films to the public, a use which was both innocuous and in accordance with the public policy. A similar situation was present in the *International Boxing Club*<sup>122</sup> case. The ownership of Madison Square Garden gave the defendants control of a "bottleneck" resource and was thus essential to their conspiracy,<sup>123</sup> but the arena was normally used for

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115. *Id.* at 152.

116. *International Boxing Club v. United States*, 358 U.S. 242 (1959).

117. *Id.* at 260.

118. *Id.* at 256.

119. 323 U.S. at 400.

120. *Id.* at 428.

121. 334 U.S. at 144-48.

122. *International Boxing Club v. United States*, 358 U.S. 242 (1959).

123. *Id.* at 248.

the proper purposes of sports exhibition. The stock in Madison Square Garden was ordered divested.<sup>124</sup>

It remains only to ask whether the "instrumentalities" theory, like the "fruits" theory, is a transitional rule that has to some extent been overtaken by more modern antitrust concepts. The answer appears to be that the two theories do indeed stand on a roughly equal footing. The principal instrumentalities cases date from the late 1940s, the same period during which the fruits theory was developed, and the two probably emerged in response to the same juridical needs. On the other hand, however, the instrumentalities theory, again like the fruits theory, has never been abandoned. It was even reaffirmed by the *International Boxing Club* decision in 1959.<sup>125</sup> Thus it appears that the theory remains as a valid option for those particular fact situations in which it will apply.

Those situations may actually be quite broad and important, since *Paramount* and *International Boxing Club* held the instrumentalities theory applicable to assets that simply conferred significant market power, either because those assets were large relative to the market or were "bottleneck" resources. Hence the instrumentalities theory may apply whenever the defendant has made use of assets that account for a large share of a relevant market.

#### E. *Use of Structural Remedies to Forestall a Bent Toward Recidivism*

Finally, structural relief is appropriate when it will act as a brake on defendants who have a particularly clear predisposition toward antitrust violations. This is best illustrated by a series of cases arising out of the meat-packing industry, in which firms had conspired among themselves to enter the grocery business by means of predatory pricing. They were not only enjoined from that improper conduct, but were also forbidden to go into the grocery business at all.<sup>126</sup> Upon a subsequent request for modification the Supreme Court left this term intact: "Size and past aggressions induced the fear in 1920 that the defendants, if permitted to deal in groceries, would drive their rivals to the wall. Size and past aggressions leave that fear unmoved today."<sup>127</sup>

It is not clear whether the threat of recidivism is an independent basis for structural relief, or whether it is instead a "tie-breaking" factor that may be considered only when structural relief is also justified, although not

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124. *Id.* at 258.

125. 358 U.S. at 255-56.

126. *See* *United States v. Swift & Co.*, 286 U.S. 106, 109-12 (1932) (Cardozo, J.).

127. *Id.* at 117. The weight of this case as precedent is diminished to some extent by the fact that the initial injunction was imposed pursuant to a consent decree. The case therefore does not unequivocally establish that structural relief can be granted on this theory in an adversary context. It seems most likely that it can, however. The Supreme Court did not limit its decision, as it could easily have done, to a consideration of the narrow circumstances under which consent judgments can be modified. Rather, it went on in the language quoted above to consider the underlying merits of the original decree.

required, on some other ground. The existing decisions are ambiguous on this point. On balance, however, the best reading seems to be that it is a separate theory. This conclusion is suggested by two Supreme Court opinions. In the *Swift* case, quoted above, the Court seemed to indicate that its decision did not rest on any finding of monopoly power, or other situation for which a structural remedy would ordinarily lie: "Mere size . . . is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."<sup>128</sup> This issue was also addressed in the theater-circuit litigation. The Court there used the defendant's past conduct as a basis for prohibiting certain kinds of theater acquisitions in the future, even though such a ban was, of course, not necessary in order to dissipate their present monopoly power: "The pattern of past conduct is not easily forsaken. Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct . . . ."<sup>129</sup>

Some may question whether any of these cases really dealt with structural relief at all. They certainly did not call for dissolution, divestiture, or other traditional forms of that remedy. Yet they do appear to be "structural" in the most basic sense of the word. They affected the underlying competitive makeup of an industry by keeping certain firms out of it entirely. There is, moreover, no logical reason for limiting the remedy to this extent. If the threat of recidivism will justify keeping a firm out of an industry in the first place, it should also justify forcing that firm out of an industry it has already entered.<sup>130</sup> Thus there seems no reason why this theory will not support a conventional divestiture action as well.

Another, more indirect line of analysis also supports the notion that the "threat of recidivism" is a separate legal theory. This analysis considers the cases that have attempted to apply the theory in the opposite direction and, treating the defendant's innocent intentions as indicative of a non-recidivist character, have tried to deny the kind of structural relief that

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128. *Id.* at 116 (citations omitted).

129. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186 (1944). A somewhat different legal principle emerges from the *Alcoa* litigation, however. The trial court there pointed to the defendant's basically good intentions as one reason for denying structural relief. *Alcoa* did not have "an inveterate purpose to dominate an industry." *United States v. Aluminum Co. of America*, 91 F. Supp. 333, 345 (S.D.N.Y. 1950). Hence it would be improper to grant "a magnification of remedies." *Id.* This last phrase suggests that divestiture predicated on bad intent is a form of enlarging a remedy already granted on some other theory, rather than being an independent remedy in its own right. This entire passage is dictum, however. It is outside the primary concerns of that case since the problem there was largely cured by the sale of war-surplus aluminum plants to smaller competitors. The passage should therefore be given only limited weight.

130. The statement in text is not precisely correct. There are transaction costs involved in moving a firm out of an industry, and no such costs in remaining out from the beginning. Hence a court would be somewhat more reluctant to order a divestiture entailing such costs. Given the relatively small size of the transaction costs in comparison with the opportunity costs imposed by the divestiture as a whole, however, it would seem that the two situations are equivalent for many practical purposes.

might otherwise be justified.<sup>131</sup> Both of those decisions were overturned at later stages of their proceedings.<sup>132</sup> This fact does not conclusively prove anything in particular, for there were a number of reasons for the reversals.<sup>133</sup> It tends to suggest, however, that the issue of the defendant's intent will cut in only one direction—a bad intent will enlarge remedies but a good intent will not diminish them. This in turn suggests that recidivism is a full-fledged legal theory rather than a mere equitable consideration. An equitable consideration would presumably be taken into account regardless of which way it pointed, but a legal theory is either relevant or irrelevant to the facts of a particular case.

### III. WHEN STRUCTURAL RELIEF HAS BEEN HELD INAPPROPRIATE

The cases discussed in the previous section covered a great deal of ground. They indicated that structural remedies may be proper over a relatively wide range of circumstances. It should not be thought, however, that such remedies are always appropriate. The case law has also identified a number of specific situations in which structural relief should not be ordered. Those situations are the subject of this section.

In a sense there is only one such "situation," rather than a plurality of them. The cases holding against structural relief have generally involved the application, to a variety of factual situations, of a single legal principle. That principle rests on the belief that structural remedies are harsh and should not be resorted to unless clearly necessary. The principle therefore states that structural remedies should not be used if some other remedial device is available and would be equally effective.

Although the cases may not always articulate this principle, they do reflect it in the rationales given for holdings in a number of specific circumstances. Structural relief has been held to be improper: (1) when it is punitive; (2) when less harmful means are available for accomplishing the same result; (3) when there are practical obstacles to its use; (4) when it would unduly harm such third parties as creditors or shareholders of the defendant; and (5) when it would place the defendant in a legal status significantly different from that of his competitors. The possible loss of business efficiencies, on the other hand, although sometimes thought a defense to a divestiture action, does not appear to be one. These various situations will be discussed in sequence below.

#### A. *Punitive Remedies*

Structural relief would be improper, first of all, when it is used to

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131. *United States v. E.I. duPont de Nemours & Co.*, 177 F. Supp. 1, 14 (N.D. Ill. 1959) (dictum); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953).

132. *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316 (1961); *United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968).

133. The *duPont* case was reversed for its failure to order full divestiture. See 366 U.S. 316 (1969). *United Shoe Machinery* was reversed later, at the time of a ten-year review, when it was determined that pure conduct relief was not having sufficient effect. See 391 U.S. 244 (1968).

punish the defendant rather than to correct the violation: "This is a civil, not a criminal, proceeding. The purpose of the decree, therefore, is effective and fair enforcement, not punishment."<sup>134</sup> This point has been repeated and paraphrased in many cases: "Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."<sup>135</sup>

This principle is so well accepted that it is now of largely theoretical importance. Very few cases prescribe remedies for overtly<sup>136</sup> punitive purposes. Attempts of this sort do occur, however, from time to time. This is illustrated by the *National Lead* case, quoted above,<sup>137</sup> in which the defendants had established a worldwide cartel in the sale of titanium paint pigment. This was accomplished by various misuses of patent rights. Patents were pooled, proliferated, and cross-licensed in such a way as to divide territories globally.<sup>138</sup> The district court found for the government and ordered, among other relief, that the patents be licensed to all applicants at reasonable royalties.<sup>139</sup> This forced licensing amounted in effect to a divestiture sale of the patent rights.

On appeal to the Supreme Court, however, the government objected to the provision for reasonable royalties. It asked instead for royalty-free licensing or for a decree enjoining the defendants from enforcing their patents. Either of these alternatives, it will be noted, would amount to a forfeiture of the patents. The Court declined to make such a change:

Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily of the misuse of patent rights . . . that conduct is not before this Court for punishment. It is brought before this Court in order to secure an order for its immediate discontinuance and for its future prevention.<sup>140</sup>

The Court reasoned that a decree as drastic as forfeiture would be justified only if it were necessary in order to reopen the market to competition,<sup>141</sup> and this did not appear to be the case. Rather, the government appeared to be influenced by the scope of the antitrust violation, and its goals were therefore more nearly punitive than remedial.

## B. *Availability of Less Harsh Remedies*

Truly punitive structural decrees may be quite rare, but on appeal it is

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134. *United States v. National Lead Co.*, 332 U.S. 319, 338 (1947).

135. *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961). *See also* *United States v. Aluminum Co. of America*, 148 F.2d 416, 446 (2d Cir. 1945) ("Dissolution is not a penalty but a remedy.").

136. Covertly punitive purposes are merely harder to detect, not proper. *See Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1945). ("We may not impose penalties in the guise of preventing future violations.")

137. *See* text accompanying note 134 *supra*.

138. 332 U.S. at 327-28.

139. *Id.* at 336.

140. *Id.* at 348.

141. *Id.* at 349. *See also id.* at 357 (similar considerations applicable to provision of know-how at a reasonable charge).



common for defendants to charge that the remedy had this character. Defendants making this argument are generally using the word "punitive" in a figurative rather than a literal sense. They are not complaining that the trial court was actuated by motives of retribution, but rather that the decree, while a rational cure for the violation, is broader or harsher than necessary: "It is said that these provisions are inequitable and harsh income tax wise, that they exceed any reasonable requirement for the prevention of future violations, and that they are therefore punitive . . . ." <sup>142</sup>

An argument along those lines invokes a well-established legal principle. The courts have agreed that divestiture, while it may be available in a particular situation, should not be invoked as long as some other less disruptive remedy would also meet the needs of the case. This principle appeared as early as the decision in *Standard Oil*, in which the Court observed that "one of the fundamental purposes of the statute [the Sherman Act] is to protect, not to destroy, rights of property." <sup>143</sup> A similar observation was made a few years later. "So far as is consistent with this purpose [curing the violation] a court of equity dealing with such combinations should conserve the property interests involved . . . ." <sup>144</sup> The Court has described dissolution as a remedy "extreme, even in its mildest demands," and has concluded that "[i]f there be need for this the difficulties of achievement should not deter; but the difficulties may admonish against the need . . . ." <sup>145</sup>

These statements convey the broad outlines of an important principle: divestiture should not be used if another equally effective remedy is available. The statements do not, however, flesh out that principle with the kind of detail required for a complete understanding of it. In particular they leave some doubt about the exact nature of the "equally effective" alternative, and about what the Commission must prove in order to show that no such alternative exists. At least three different standards are consistent with the judicial language quoted above: (1) the Commission must show that divestiture is the most effective remedy for the violation; or (2) it must show that divestiture is the most cost-effective remedy; or (3) it must show that divestiture is the only effective remedy.

It appears that the third standard is correct. The Commission must generally show that divestiture is the only effective remedy before it will be granted. This conclusion is most easily reached through a process of elimination. The courts have already rejected the first two standards in a reasonably decisive way.

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142. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944).

143. *Standard Oil Co. v. United States*, 221 U.S. 1, 78 (1911).

144. *United States v. Union Pac. R.R. Co.*, 226 U.S. 470, 477 (1913).

145. *United States v. United Shoe Mach. Corp.*, 247 U.S. 32, 46 (1918). *See also* *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 361 (1961) (Frankfurter, J., dissenting); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603 (1951) (Reed, J., concurring); *NBO Industries Treadway Companies, Inc. v. Brunswick Corp.*, 523 F.2d 262, 279 (3rd Cir. 1975), *rev'd on other grounds sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

They have, first of all, rejected the notion that divestiture must be shown to be the single most effective remedy to the violation. Rather, the various possible remedies are considered to be either effective or not. Once a remedy has crossed the threshold to "effective" status, it is no longer compared with alternative remedies to see which would be marginally better in curing the violation. The choice among effective remedies is instead made on other grounds such as hardships or administrative feasibility. This is best illustrated by the proceedings in the *duPont*<sup>146</sup> case. There the Supreme Court observed that "[e]conomic hardship can influence choice only as among two or more effective remedies."<sup>147</sup> From this it follows that economic hardship *can* influence the choice when both remedies are effective, and, as a result, a search is not necessarily made to determine which of the remedies is precisely the best.

The role of hardship in the calculus is still limited, however. The courts have also rejected the second possible formulation—that costs should be systematically weighed in every case, and that divestiture should be granted only when it is the remedy that appears most desirable in cost-benefit terms. Rather, the costs of divestiture are wholly irrelevant until a certain threshold of effectiveness has first been met. This is illustrated by several cases. In *duPont*, as noted above, the Supreme Court held that economic hardship "can influence choice only as among two or more effective remedies."<sup>148</sup> Thus the costs of a remedy would not be considered at all until two effective ones had been found. In the *United Shoe Machinery*<sup>149</sup> litigation the Court mandated a divestiture without questioning the trial court's finding that the business did not lend itself to division and that, presumably, serious harm would result if such a division were attempted. The Court found it sufficient to observe that the conduct remedy had not been effective in curing the violation.<sup>150</sup> Thus, again, the possible costs involved did not appear to enter into the Court's calculations.

This is not to say that costs have no place in the selection of a remedy, but only that remedies are not chosen through a rigorous application of cost-benefit principles. The Court's analysis would have looked considerably different if they were. Costs would have been relevant—and would have been considered—even in the context of a remedy that fell slightly below the desired threshold of effectiveness. They would have been relevant in that context because they could have been very small, and so could have made the remedy, on balance, more cost effective than one whose effectiveness was just slightly over the threshold but whose costs were very much greater. Cost, in short, must always be considered in a

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146. *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316 (1961).

147. *Id.* at 327.

148. *Id.*

149. *United States v. United States Shoe Mach. Corp.*, 391 U.S. 244 (1968).

150. *Id.* at 251.

cost-benefit analysis. If they are not always considered then the courts are proceeding under some other principle.

This leaves us with the third standard: before obtaining divestiture the government must show that only that remedy will effectively cure the violation. The notion of costs does not appear explicitly in this formulation but appears to underlie it tacitly. Divestiture is presumed to be harmful to the respondent, and thereby to impose costs upon it, in every case. Nobody likes to be dissolved. In order to justify inflicting this harm the government must therefore show that it is necessary. It must show that no other remedy—presumptively less harmful<sup>151</sup>—would meet the needs of the case.

The courts have not generally articulated this rationale or expressly endorsed the concept of presumptive costs. Their decisions are, however, consistent with this theory. The language in many cases suggests that the government has the burden of showing a specific need for divestiture as a remedy. In *Alcoa*, for example, the Second Circuit made the following observation: “[I]f the industry will not need [dissolution] for its protection, it will be a disservice to break up an aggregation which has for so long demonstrated its efficiency.”<sup>152</sup> In another case the Supreme Court stated this point with even greater clarity:

There is no showing that four major competing units would be preferable to two, or, including Zirconium and Virginia Chemical, that six would be better than four. . . . It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion.<sup>153</sup>

There is one class of cases that may be an exception to this rule, but it is narrowly defined. It will be recalled that structural remedies are presumed to be proper in situations in which they would directly undo a single improper action, such as a merger or the creation of a holding-company monopoly. In these cases the government may not have the burden of proving the necessity for divestiture.<sup>154</sup> Such cases, however, are apparently restricted with some rigor to the two situations identified

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151. A different situation might be posed if a respondent were to *request* divestiture in lieu of a conduct remedy. Such cases are likely to be quite rare, however.

152. *United States v. Aluminum Co. of America*, 148 F.2d 416, 446 (2d Cir. 1945).

153. *United States v. National Lead Co.*, 332 U.S. 319, 352-53 (1947). In some respects the *National Lead* case may not be a safe precedent. It was decided on a 4-3 vote and the opinion was written by Justice Burton, rather than by Justice Douglas as was usual for antitrust cases during that period. The decision might be faulted on its actual merits, moreover, in the sense that there is some credible evidence linking decreased concentration with improved economic performance generally. With respect to *National Lead's* holding on the basic burden of proof issue, however, it seems to be consistent with the general body of case law on the subject. The case may be understood as turning on the government's failure to introduce evidence on a crucial point.

154. Technically speaking the defendant may have the burden of going forward on this issue, while the ultimate burden of proof still rests on the government as the plaintiff in the suit.

above. This is best illustrated by the decisions that have refused to extend presumptive divestiture from original to after-acquired assets.

In one such case the respondent purchased a company engaged in the business of manufacturing florists' foil. The acquisition was found improper and the D. C. Circuit had little difficulty in upholding a divestiture order.<sup>155</sup> The order extended, however, only to the restoration of the *status quo ante*. It did not include a new manufacturing plant that the acquiring company had built for its subsidiary. The circuit court was willing in principle to include this property in the divestiture, but only if the Commission could prove the necessity of this step in accordance with the general burden of proof:

Inasmuch as there is a failure on this record to demonstrate (1) any nexus between continued possession of after-acquired property . . . and violation of Section 7, and (2) that restoration of the competitive status quo compels divestiture of such property, that part of the Commission's order requiring divestiture of property built or acquired after the 1956 acquisition . . . cannot be sustained.<sup>156</sup>

Thus the special presumption favoring the government has been confined to those circumstances—such as mergers—under which it originated. It has not been extended to those situations—such as the acquisition of additional assets following a merger—that might be considered as the next logical corollaries.<sup>157</sup>

The basic rule regarding burden of proof, moreover, is not limited to those major situations in which the government seeks to have an entire operating unit divested. It also applies to the more minor and collateral terms of a decree. There too the government can obtain a structural remedy only by showing that it is necessary for effective relief. This was made clear in *Hartford-Empire Co. v. United States*,<sup>158</sup> the case dealing with the patent pool in the glassmaking industry. The trial court in *Hartford-Empire* ordered major structural relief.<sup>159</sup> It also enjoined the individual defendants from holding financial interests in more than one company engaged in that business.<sup>160</sup> The Supreme Court modified this collateral aspect of the decree, however, on the grounds that it was overly broad. The decree covered small shareholdings that would not confer control; it covered investments in firms that produced only a little

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155. *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962) (Burger, J.).

156. *Id.* at 231.

157. It might be wiser if this extension were made, however. The acquired firm proved unsalable without the inclusion of the after-acquired assets, and it was eventually ordered liquidated. See *Reynolds Metals Co.*, [1965-67] TRADE REG. REP. (CCH) ¶ 17,560 at 22,838. Cf. *United States v. Reed Roller Bit Co.*, 274 F. Supp. 573 (W.D. Okla. 1967). Two consent decrees, on the other hand, have provided for the inclusion in the divestiture of all additions and improvements. See *United States v. Combustion Eng'g, Inc.*, [1971] Trade Cas. ¶ 73,648 (D. Conn. 1971); *Gates Rubber Co.*, [1970-73] TRADE REG. REP. (CCH) ¶ 19,657.

158. 323 U.S. 386 (1945).

159. *Id.* at 411-12.

160. *Id.* at 424-25.

glassware; and it covered ownership of bonds as well as of voting stock. There had been no showing that a cure to the violation required coverage this broad. The decree was therefore amended so as to exempt such situations.<sup>161</sup>

The basic law on this point thus appears to be reasonably clear. Two general principles have emerged. Structural relief should not be ordered as long as some alternative remedy would be equally effective in curing the violation; and the government must prove the absence of such alternatives by showing that divestiture—and only divestiture—will successfully restore competitive conditions. It might therefore be thought that these principles will raise a substantial barrier against the use of structural remedies.

This, however, is not necessarily the case. The government must advance some evidence of the need for divestiture, to be sure, but the quantum of proof required does not seem particularly great. It appears that even a small but reasonable doubt about the efficacy of the alternative remedies will be sufficient to justify a decision in favor of structural relief. This principle emerges from both the *United Shoe Machinery* and the *duPont* litigations.

In each of these cases the trial court had ruled against divestiture, framing instead an alternative plan of relief that seemed to be less burdensome and equally effective.<sup>162</sup> In each case the Supreme Court reversed on the grounds that there was some doubt about the efficacy of the trial court's plan.<sup>163</sup> What is significant about these cases, however, is how slight and attenuated the grounds for the Supreme Court's doubts actually were.<sup>164</sup>

These cases will be reviewed under the next two headings of the paper. *United Shoe Machinery* will be considered in connection with the exemption from structural relief that is sometimes given where there are practical obstacles to its use. *DuPont* will then be examined in connection with the exemption that is sometimes given to protect the interests of innocent third parties.<sup>165</sup>

### C. *Existence of Practical Obstacles*

Structural relief is clearly inappropriate in cases in which the legal or factual preconditions for it do not exist. Even when the law and the facts would both warrant such a remedy, however, it is not always granted. Sometimes there are practical obstacles to its use that would justify, as an exercise of discretion, a decision not to use it.

Courts have yielded to exigent circumstances in this manner on a few

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161. *Id.* at 424-26.

162. See text accompanying note 132 *supra*.

163. See note 133 *supra*.

164. See notes 166-92 and accompanying text *infra*.

165. See text accompanying notes 166-73, 175-92 *infra*.

occasions. In one monopolization case,<sup>166</sup> for example, the court agreed that dissolution was legally justified,<sup>167</sup> but still withheld that remedy on the grounds that the defendant's business did not lend itself to such an action:

The Government's proposal that the Court dissolve United into three separate manufacturing companies is unrealistic. United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts.<sup>168</sup>

The basic concept underlying this case appears to be correct: the Commission cannot logically be obligated to order structural relief if the circumstances are such that it would be unworkable. It also appears, however, that this concept is somewhat narrower than might be thought. Structural relief, if otherwise justified, cannot be denied merely because it would be cumbersome or impractical to carry out.<sup>169</sup> Rather, it must be virtually impossible to achieve before less effective remedies should be considered. This was made clear by the subsequent history of the litigation.

The *United Shoe Machinery* case was overturned during a ten-year review of the progress achieved under the trial court's conduct decree.<sup>170</sup> The Supreme Court—in one of its most significant omissions—made no reference to the practical difficulties of dividing the defendant's business. It focused its analysis exclusively on the court's duty to provide some form of effective relief:

If after 10 years it were shown that the decree had not achieved the adequate relief to which the Government is entitled in a § 2 case, it would have been the duty of the court to modify the decree so as to assure the complete extirpation of the illegal monopoly. The court's power to do this is clear. Its duty is implicit in the findings of violation of § 2 and in the decisions of this court as to the type of remedy which must be prescribed.<sup>171</sup>

The Supreme Court holding was phrased in mandatory terms. In-

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166. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

167. It was legally justified because the defendant corporation had monopolized its industry, and, on the authority of *Alcoa* and *Griffith*, divestiture was viewed as an established remedy for that offense.

168. 100 F. Supp. at 348.

169. Some earlier decisions had indeed used the language of "impracticality." See, e.g., *United States v. United States Steel Corp.*, 254 U.S. 417, 453 (1920) (divestiture denied since court did not see a way to dissolve combination while simultaneously protecting its foreign trade); *United States v. General Elec. Co.*, 115 F. Supp. 835, 864 (D.N.J. 1953) (divestiture of electric lamp business found neither feasible nor necessary). Although these cases may still remain sound in their ultimate outcome, however, it is doubtful that they correctly state the current law on the present point.

170. *United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968). The trial court conducted this review pursuant to a term in the original decree, and concluded that no revisions in the order were necessary. See 266 F. Supp. 328 (D. Mass. 1967). It was this decision that was appealed to the Supreme Court.

171. 391 U.S. at 251.

deed, on the previous page the Court had made its peremptory nature even more clear; it referred there to the trial court's "inescapable responsibility" of ensuring effective relief.<sup>172</sup> From this it would appear that the exemption for practical considerations is really quite limited, and will apply only when the option of divestiture is absolutely unworkable.<sup>173</sup>

#### D. *Harm to Third Parties*

A variation of the "practical difficulties" point has sometimes been raised as a fourth reason for denying structural relief. This too considers the practical effects of the decree, focusing not on the harm it might do to an indivisible defendant but rather on the harm it might do to innocent third parties:

[In devising relief] three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisitions either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning.<sup>174</sup>

Several classes of "third parties" have a claim on the court's solicitude—creditors of the defendant, for example, or employees, or members of the general public. The class most frequently considered, however, is the defendant's shareholders. These persons may be innocent of wrongdoing themselves, since they cannot generally be expected to know that their company has violated the antitrust laws, yet they still have to bear the real costs of any remedy that is imposed on it. Courts are therefore entitled to take account of their situation, and, all other things being equal, to select a remedy that will harm them as little as possible. As in the case of the "workability" exemption, however, divestiture may be denied on this ground only when some other and equally effective remedy is available.

This is best illustrated by the history of the *duPont* case previously referred to during the discussion of mergers<sup>175</sup>—the case involving that company's acquisition of some twenty-three percent of the common stock

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172. *Id.* at 250.

173. The actual degree of "unworkability" in this case is subject to some dispute. After the Supreme Court decision was announced, the defendant entered into a consent decree under which it agreed to divest sufficient assets to reduce its market share to 33%. See [1969] Trade Cas. ¶ 72,688 (D. Mass. 1969). This suggests that the practical obstacles to relief were not actually as great as the courts may have supposed. It is also possible, on the other hand, that by consenting the defendant was merely attempting to forestall the still greater evil of a court-ordered divestiture plan. In either event the truly significant fact about the matter was the way that it appeared to the Supreme Court. The Court was willing to order divestiture relief even at a time when it appeared that this course would entail significant practical costs.

174. *United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1911).

175. See text accompanying notes 47-51 *supra*.

in General Motors.<sup>176</sup> The government sought an order requiring duPont to divest itself of this stock by distributing it to its own shareholders as a special dividend. For three reasons, however, the trial court was reluctant to order this relief. First, the duPont shareholders would be heavily taxed on the market value of this dividend.<sup>177</sup> Second, the sales of the distributed stock—by recipients who either did not wish to hold it or who had to raise money for the taxes—would depress the market value of both duPont and GM stock.<sup>178</sup> Third, the GM shares that would be distributed to the duPont family holding companies and that would have to be sold pursuant to the requested decree would bear a capital gains tax of over \$200 million.<sup>179</sup> The trial court therefore concluded that complete divestiture would be unduly harsh. It “would entail harsh consequences to a large number of innocent parties and would therefore to that degree be against the public interest and also offensive to justice.”<sup>180</sup>

To deal with the violation, the trial court ordered conduct relief instead.<sup>181</sup> DuPont was enjoined from director interlocks with General Motors and from preferential business relationships with that firm.<sup>182</sup> DuPont was permitted to retain the legal titles to the GM shares, but was to “pass through” the voting rights to its own shareholders. Officers or directors of duPont were not to exercise any passed-through votes to which they might be entitled.<sup>183</sup>

The Supreme Court reversed.<sup>184</sup> It agreed, as it apparently did in *United Shoe Machinery*,<sup>185</sup> that equitable considerations could sometimes tip the balance in favor of conduct relief. But it found that conduct relief

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176. At the time of the second trial this amounted to 63 million shares with a market value of approximately \$3.5 billion. 177 F. Supp. at 13.

177. *United States v. E.I. duPont de Nemours & Co.*, 177 F. Supp. 1, 17 (N.D. Ill. 1959).

178. *Id.* at 27.

179. *Id.* at 21.

180. *Id.* at 12. The trial court was fortified in this view by the belief that the government itself had helped to put the duPont shareholders in their uncomfortable position. By its long delay in bringing the suit it let many people purchase shares who would not have done so if remedial action had been more prompt. *Id.* at 13.

181. The trial court evidently believed that this relief would be as effective as full divestiture. It certainly was aware that it could be justified on no other grounds:

This does not mean that the private interests of stockholders can outweigh the public interest in a judgment that will effectively dissipate the effects of the acquisition found to be unlawful. But it does mean that in the opinion of this Court the primary public purpose should be achieved so far as possible without inflicting unnecessary injury upon innocent stockholders in the various corporations involved. The purpose of the decree should be remedial and not punitive. . . . No harsh and oppressive consequences should be visited upon the stockholders unless it can be shown on the facts that these results are inescapable if a decree is to be framed that will comply with the mandate of the Supreme Court.

177 F. Supp. at 13-14 (citations omitted).

182. *Id.* at 39, 45.

183. *Id.* at 39.

184. 366 U.S. 316 (1961).

185. *See United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250-51 (1968) (trial court “may, if the circumstances warrant, accept a formula for achieving this result by means less drastic than immediate dissolution or divestiture”).



would not be an effective alternative here. The individuals exercising the passed-through votes on the GM stock would also be stockholders in duPont. It would be to their interest to vote for a GM management that would tacitly continue the favored status for duPont, and so the pass-through would not necessarily end the improper community of interest between the two companies.<sup>186</sup>

Having found the trial court's remedy to be deficient, the Supreme Court had little difficulty in concluding that full divestiture was necessary:

If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. This proposition . . . is deeply rooted in antitrust law and has never been successfully challenged.<sup>187</sup>

This decision is even broader than its language would suggest. Like *United Shoe Machinery*, it gathers strength and significance from the nature of the alternative that was rejected. In both cases the position taken by the trial court had much to recommend it. In *duPont*, for example, it hardly seems likely that the scattered individual shareholders could have coordinated their efforts well enough to actually influence the selection of General Motors directors.<sup>188</sup> Hence it appears that the pass-through remedy would have worked reasonably well. Similarly, the trial court's remedy in *United Shoe Machinery* was working as intended. It had already reduced United's market share by some twenty-three percent, and, more significantly, had led the purchasers of shoemaking machinery to state that they were satisfied with conditions prevailing in that market.<sup>189</sup> Yet both of these remedial plans were rejected by the Supreme Court. This suggests that countervailing concerns—such as stockholders' interests—will prevail on only rare occasions. That in turn suggests that alternative remedies will be judged very strictly and will be found wanting if they are even slightly less effective than full divestiture.

186. 366 U.S. 316, 331 (1961).

187. *Id.* at 327. For this proposition the Court cited *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944) ("Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their project on the plea of hardship or inconvenience"); *United States v. Corn Prods. Ref. Co.*, 234 F. 964, 1018 (S.D.N.Y. 1916), *appeal dismissed on motion of appellant*, 249 U.S. 621 (1919); *United States v. E.I. duPont de Nemours & Co.*, 188 F. 127, 153 (C.C.D. Del. 1911), *modified*, 273 F. 869 (D. Del. 1921); *In re Crown Zellerbach Corp.*, [1957-58] TRADE REG. REP. (CCH) ¶ 26,923, at 36,462.

188. *Cf.* 366 U.S. at 355 (Frankfurter, J., dissenting). DuPont's officers and directors would still remain as a compact bloc and, to the extent that they were members of the duPont family, might own a considerable number of shares. Under the trial court's decree, however, the shares owned by these people were "sterilized" and could not be voted at all.

189. The trial court was aware that these firms might simply be reluctant to offend the defendant, but apparently concluded that their testimony was sufficiently unanimous to have probative value. 266 F. Supp. at 332.

The Court did not elaborate further on the reasons for its decision in *duPont*. It focused on the need for an effective remedy and let the matter rest at that point. Underlying this result, however, were probably unarticulated reservations about the actual strength of stockholders' equitable claims in general. Three grounds for these reservations can be imagined. First, those persons who bought their stock many years ago, and saw its value rise in response to a company's profitable antitrust violations, had no moral claim to retain this increment to its value. They would not lose anything for which they had paid if this increment were eliminated. Second, those persons who bought the stock more recently, and paid a price that already reflected the capitalized value of those violations, had likewise been done no cognizable injury. Their situation was certainly more sympathetic than that of the early purchasers, but they had not been harmed to any greater degree than they would be by an unquestionably proper conduct order that was also effective in curing the violations.<sup>190</sup> Third, it is not empirically clear that stock prices actually decline in response to a divestiture decree. The earnings of the restructured firm or firms will presumably be reduced to the extent that supracompetitive profits are eliminated. Offsetting this, however, is the possibility of increased output and increased efficiency—and hence of lower costs and higher profits—in the more competitive environment that results.<sup>191</sup> These two factors may balance out in a way that would leave the actual stock values largely unaffected.<sup>192</sup>

Stockholders are the third parties whose claims have most frequently been considered by the courts. They are not the only such parties, however. In at least two cases the interests of the general public were cited as a reason for avoiding certain remedies. In one case the court declined to appoint a receiver to reorganize a monopolizing corporation, reasoning that this step

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190. Indeed, those shareholders may already be exposed under current treble-damage law to losses considerably greater than would result from a government divestiture action.

191. Cf. LEIBENSTEIN, *BEYOND ECONOMIC MAN: A NEW FOUNDATION FOR MICROECONOMICS* (1976) (managerial slack is one of the most significant costs of monopoly).

192. This analysis does not purport to describe the realities of a divestiture situation. It is merely intended to show that there is some question about the strength of shareholders' claims. Considerably more empirical work needs to be done in this area before firm statements can be made. At least three lines of anecdotal evidence, however, tend to support the proposition given in the text. First, the reorganizations under the Public Utility Holding Company Act did not significantly affect the relative value of the various securities involved. See Brodley, *Industrial Deconcentration and Legal Feasibility: The Efficiencies Defense*, 9 J. ECON. ISSUES 365 (1975). See also Blair-Smith & Helfenstein, *A Death Sentence or a New Lease on Life*, 94 U. PA. L. REV. 148 (1945); Comment, *Section 11(b) of the Holding Company Act & Fifteen Years in Retrospect*, 59 YALE L.J. 1088 (1950). Second, the dissolution ordered in *Standard Oil* was widely predicted to result in a destruction of stock market values. Actually, however, the stock of Standard Oil of New Jersey advanced by 14 points after the decree was announced, and it quadrupled in value within the following six years. See P. GIDDEN, *STANDARD OIL COMPANY (INDIANA)* 126, 136-37 (1956); H. SEAGER & C. GULICK, *TRUST AND CORPORATION PROBLEMS* 124 (1929). Third, other sources also indicate that divestiture does not necessarily have undesirable business consequences. See E. HADLEY, *ANTITRUST IN JAPAN* (1970) (dissolution of zaibatus); *The International Aspects of Antitrust Law: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 761 (1979) (statement of Dr. E. Kantzenbach) (deconcentration in postwar Germany); Baldwin, *The Feedback Effect of Business Conduct on Industry Structure*, 12 J. L. & ECON. 169 (1969) (review of 1912 *duPont* decree).

might disrupt the flow of goods to the public.<sup>193</sup> In another case the trial court refused to order movie distributors to divest themselves of theaters that they owned. The court believed that the new theater operators would not be sufficiently experienced to give the public equal service, and noted that the alternative remedy of a competitive bidding system would be equally effective in curing the vertical trade restraints.<sup>194</sup>

The interests of still other possible classes of third parties, such as creditors and employees, do not yet appear to have been invoked as a reason for denying structural relief. In principle there is no reason why they could not be considered in that way.<sup>195</sup> Here as elsewhere, however, these considerations would influence the choice only if an effective alternative remedy were available.

#### E. *Placement of Defendant in a Special Class*

Finally, there is a fifth limitation on the use of structural remedies. They should not be invoked or framed in a way that places the defendant in a class separate from his competitors, and outside the ordinary protection of the laws:

[T]he court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, "in a different class than other people," as the Government has suggested. The decree must not be "so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt," enjoin "all possible breaches of the law," or cause the defendants hereafter not "to be under the protection of the law of the land."<sup>196</sup>

This limitation has much in common with two that were discussed earlier—the principle that relief should not be punitive, and the principle that it should not be broader than necessary. Yet the limitation discussed here is slightly different from each of these. Both of them addressed the *scope* of the remedy. They limited, respectively, the purposes that it might serve and the degree of burden that it might impose. The limitation in this

193. *United States v. American Tobacco Co.*, 221 U.S. 106, 186-87 (1911).

194. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 170 (1948). The *Paramount* decision is not a wholly reliable precedent. The Supreme Court disagreed with this outcome in two respects. It thought that the competitive bidding system would involve the courts too deeply in business matters to be desirable; and it thought the trial court had not considered all possible theories of economic harm that might result from the defendants' arrangements. *Id.* at 173-75. The Court therefore remanded the case for further consideration. In so doing the Court did not expressly hold that vertical divestiture was required, notwithstanding the possible harm to the general public, but this appeared to be implicit in the Court's language. The defendants, evidently anticipating this result, entered a consent decree shortly thereafter in which they agreed to substantial divestiture. See [1948-49] Trade Cas. ¶ 62,335 (S.D.N.Y. 1948). In some senses, however, these later events do not detract from the proposition stated in the text above. The Supreme Court may have disagreed with the trial court's assessment of certain factual and economic matters, but it did not appear to disagree, in principle, with the idea that the interests of the general public should be protected so long as this was consistent with the selection of an effective remedy.

195. For example, employees may be affected by employment dislocations or by reductions in pension benefits due to a decline in the value of a firm, and creditors may be adversely affected by a reduction of the firm's earnings and by increased business risks.

196. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409-10 (1945) (footnotes omitted).

section is concerned with the specific *means* that a remedy can incorporate. It establishes the principle that a decree should not utilize specific terms that have the effect of placing a defendant, for the future, on a different legal footing from its competitors. A structural decree should instead act as nearly as possible on a one-time basis and should thereafter withdraw and allow the firms, within the altered structure, to compete normally with one another. This goal may be understood, in short, as a variation on the principle that courts should not become involved more deeply than necessary<sup>197</sup> in regulating the day-to-day conduct of a business.

This restriction on the use of structural relief is not particularly complex, but it can arise in a variety of forms. A few examples may help to illustrate the situations in which it has been encountered. One decree had incorporated a conduct injunction to supplement its basic structural provisions. The injunction prohibited restrictive terms in all future contracts for the sale or lease of equipment. The Supreme court limited this order to contracts on the kinds of equipment that had been involved in the original violation, reasoning that the defendant would otherwise be competitively disadvantaged in the sale of new or unrelated technology and would lose his incentive to innovate.<sup>198</sup> In another case the government sought to require grants of all manufacturing know-how that was developed over the following three years.<sup>199</sup> The request was denied on the theory that it "would reduce the competitive value of the independent research of the parties."<sup>200</sup> In a third case the trial court had forbidden all future contracts between members of a dissolved holding company monopoly. The Supreme Court upheld this term, but only after construing it as prohibiting anticompetitive contracts only. Otherwise the defendants, forbidden to conduct certain kinds of ordinary business operations, would be deprived "of the right to live under the law of the land . . . ."<sup>201</sup>

This limitation on the use of structural relief, like the others, is nonetheless valid only within certain parameters. *Any* remedial measure will apply only to the defendant, after all, and will to that extent subject him to requirements that others in the industry do not share. Yet all remedial measures are not on that account improper. The question is one of drawing lines.

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197. The potential costs of this involvement are illustrated by the history of the *Paramount* consent decree. Part of that decree regulated industry conduct, and implementation of those terms reportedly required many years of detailed supervision from the district court.

198. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 423-24 (1945).

199. *United States v. National Lead Co.*, 332 U.S. 319 (1947) ("It would discourage rather than encourage competitive research. It would be contrary to, rather than in conformity with, the policy of the patent laws now in force.")

200. *Id.* at 359.

201. *Standard Oil Co. v. United States*, 221 U.S. 1, 81 (1911). Similar principles operate under the consumer-protection half of § 5 also. It has been held improper to enjoin a defendant from all deceptive advertising in the future, even though he may have utilized deceptive advertising in the past. This subjects the defendant to contempt punishments for any violation of the law, and thereby exposes him to exceptional rather than ordinary punishments. See *Standard Oil Co. v. FTC*, 577 F.2d 653, 661 (9th Cir. 1978) (concerning F-310 gasoline additive).

The most obvious line in this area is the one between a remedial term that directly undoes the effects of an improper act, and a term that goes further and incorporates additional terms deemed to be desirable. At least one court has used this line as the basis for determining whether the "special class" defense would be applicable.<sup>202</sup> In *United Shoe Machinery*, defendant had incorporated restrictive terms in all its equipment leases, and had provided equipment only on lease rather than also offering to sell it outright. The court included in its order a provision requiring United to sell its machinery in addition to leasing it. It observed that this provision was merely corrective "because, through its own action, United has already put itself in a class different from its competitors. It has used its leases to monopolize the shoe machinery market."<sup>203</sup> At the same time, however, the court denied the government's request for a term that would make United sales terms *more* attractive than its leases. "One difficulty with this proposal is that, instead of redressing the balance between United and its competitors, it would give a marked advantage to such of United's competitors as chose to continue leasing machines,"<sup>204</sup> since lease arrangements were preferred in the industry.<sup>205</sup>

One case does not give a particularly solid foundation for describing a legal principle.<sup>206</sup> If a tentative generalization may be attempted, however, it would appear that three rules govern the use of the "special class" limitation. First, the limitation does not apply to measures that correct or directly undo an improper act on the part of the defendant. These measures may be incorporated in the decree even if they have the effect of placing the defendant in a special legal class.<sup>207</sup> Second, the limitation will apply to the collateral terms of the decree—terms that are designed, for example, to affirmatively increase competition rather than to eliminate some barrier to it. These terms are generally less essential than those covered by the first point, and so the need for them is not usually sufficiently compelling to override the policy against creating a special legal status. Third, however, the special legal status may be used, as can any other remedial device, if there are no alternatives that will effectively cure the violation. Thus even the collateral terms of the decree can place the defendant in a special status if that appears necessary to meaningful relief.

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202. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

203. *Id.* at 350.

204. *Id.*

205. *Id.*

206. This is particularly true inasmuch as a later phase of *United Shoe Machinery*, reviewing the progress achieved under the first ten years of the decree, was reversed by the Supreme Court. *See* 391 U.S. 244 (1968), *rev'g* 266 F. Supp. 328 (D. Mass. 1967). The Supreme Court held that some unspecified but more stringent remedial measures were needed to effectively cure the violation, which suggests that the trial court may have construed its powers too narrowly. There was, however, no intimation that this particular part of the case was wrongly decided.

207. These measures may still be improper according to some other limitation on structural relief. They may, for example, be more restrictive than is necessary to secure effective relief.

### F. *The "Efficiencies Defense"*

Some may believe there is a sixth circumstance when structural relief would be improper. This is the so-called "efficiencies defense." Divestiture should not be ordered, according to this view, when it would result in a loss of efficiency and would therefore lead to higher consumer prices.

Efficiency considerations undoubtedly have a place in the jurisprudence of structural relief. They may be properly relied upon in at least two circumstances. First, they are an important guide to prosecutorial discretion. The Commission will not ordinarily seek a divestiture that will result in consumer losses. Second, they state an equitable consideration that a court may properly weigh when the remedy is otherwise in doubt. The Second Circuit in *Alcoa* observed that if the matter had been in equipoise it would have let efficiencies tip the balance.<sup>208</sup>

On the other hand, however, efficiency considerations do not normally rise to the level of an affirmative defense that can preclude a divestiture that would otherwise be called for. Once a business situation is found to violate the antitrust laws it is no defense that it results in lower prices. This theme recurs in many cases. In *Brown Shoe Co. v. United States*,<sup>209</sup> the Court referred to the congressional policy of protecting "viable, small, locally owned businesses," even if this resulted in "occasional higher costs and prices."<sup>210</sup> The *Alcoa* court referred to a belief that "great industrial consolidations are inherently undesirable, regardless of their economic results."<sup>211</sup> The litigation in *United States v. Swift & Co.*<sup>212</sup> is particularly instructive. In that case the Supreme Court refused to modify a consent decree that prohibited the defendants from entering the grocery business. It did this in large part because the defendants were so efficient that they would be able to capture most of that market for

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208. *United States v. Aluminum Co. of America*, 148 F.2d 416, 446 (2d Cir. 1945) (unless necessary to assure competition "it will be a disservice to break up an aggregation which has for so long demonstrated its efficiency"). See also *United States v. American Can Co.*, 230 F. 859, 903 (D. Md. 1916) ("I am frankly reluctant to destroy so finely adjusted an industrial machine as the record shows defendant to be.").

209. 370 U.S. 294 (1962).

210. *Id.* at 344.

211. 148 F.2d 416, 428. The Second Circuit elaborated on this thesis in the following terms: [Congress] did not condone "good trusts" and condemn "bad" ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.

*Id.* at 427. Professor Turner, however, while agreeing that language of this kind correctly summarizes the case law, suggests that Congress never explicitly accepted the idea of higher costs as the price of deconcentration. See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1326 (1965).

212. 286 U.S. 106 (1932).

themselves.<sup>213</sup> The significant fact about the "efficiencies defense," in short, is that it does not exist.

This appears to be true even though some cases have relied heavily upon the language of efficiency. Upon closer examination those cases are seen to turn instead on other factors. This is illustrated by the *United Shoe Machinery* litigation. The trial court there denied divestiture on the ground that the defendant's manufacturing facility could not practicably be divided.<sup>214</sup> Although this reasoning seems to invoke considerations of efficiency, the fact situation in that case was extreme. A single factory was concerned, and the judge believed that it could not be divided at all, at least not without a truly radical increase in costs. Thus this case is best classified as one relating to the practical impossibility of divestiture, rather than as turning on efficiency considerations per se.

The law's failure to recognize an efficiencies defense is presumably based on two considerations. First, the antitrust statutes serve social and political values as well as economic ones, and so the cases do not reflect a calculus of the economic values alone.<sup>215</sup> Second, the efficiencies defense might be too time-consuming as a practical matter, and so is omitted for reasons of judicial economy.<sup>216</sup>

#### G. *How Is the Balance Struck?*

The last two sections have reviewed the current law on structural remedies. Section II outlined the circumstances in which structural relief has been held proper, and the present section has considered the circumstances in which it is improper. Since this discussion forms the foundation for the remainder of the article, it may be useful to pause and review what has been said thus far.

Structural relief is generally justified in five situations: (1) when it will undo a single improper act, such as a merger or the creation of a holding-company monopoly; (2) when it will cure an essential element of an antitrust offense, as in ordinary monopolization; (3) when it will deprive violators of the fruits of their improper actions; (4) when it will remove the instrumentalities used in carrying out the violation; and (5) when it will preclude a recidivism that might otherwise be anticipated.

Structural relief has been found improper in five other situations: (1) when it is punitive; (2) when less harmful means are available for curing the

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213. *Id.* at 115, 118. See also *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 579 (1967) (existence of economies in advertising one reason for finding acquisition unlawful).

214. See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

215. Nor, of course, do the cases reflect a calculus of social values alone.

216. The potentials for delay inherent in this defense have been mentioned by a number of commentators. See Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699 (1977) (suggesting, however, that the defense be recognized in certain limited circumstances); Posner, *Antitrust Policy and the Supreme Court*, 75 COLUM. L. REV. 282, 313 (1975). Cf. Department of Justice Merger Guidelines, [1977] TRADE REG. REP. (CCH) ¶ 4510.

violation; (3) when there are practical obstacles to its use, such as indivisible assets; (4) when it would unduly harm innocent third parties, such as shareholders of the defendant; and (5) when it would impose upon the defendant in the future a different legal status than its competitors. The possible loss of business efficiencies, however, does not state a defense that will rule out structural relief.

If a particular case falls within just one of these ten categories its resolution is simple. Structural relief will be either proper or improper according to the principle governing that category. The matter becomes more difficult when a case falls within two categories—one suggesting that structural remedies are appropriate, and the other that they are not. In that event the negative principle will control. The categories allowing structural relief are merely permissive, in other words, whereas the categories forbidding it are mandatory. This is illustrated by virtually all the cases discussed in the present section. They unquestionably concerned situations in which structural relief could, in general principle, be granted. National Lead was part of a successful conspiracy to monopolize, for example, and United Shoe Machinery was guilty of actual monopolization. Yet certain kinds of structural relief were denied in both cases, since to grant it would have violated one of the negative principles.

This rule of priorities is not as confining as it might at first appear to be. The negative principles may be controlling, but they are also narrower than their mere enumeration might suggest. They each contain internal exceptions allowing the use of structural remedies in cases where no other form of relief would be effective. Thus, the positive and negative principles are not always in conflict, and the government is never denied a meaningful remedy.

This is not to say that structural relief is always obtainable. It will not be ordered in cases where one of the negative principles applies and where conduct remedies will be able to restore competition. Judges actually, whether rightly or wrongly, may perceive cases to be the rule rather than the exception. That is suggested by the results of a study conducted by Richard Posner.<sup>217</sup> Professor Posner examined all the 125 single-firm monopolization cases brought by the Justice Department between 1890 and 1974. He found that the government obtained some relief in eighty-one percent of those cases.<sup>218</sup> Divestiture, however, was not the usual form of relief. It was ordered in only twenty-four of the 118 decided cases,<sup>219</sup> and in only eleven of the eighty-two cases that were brought in the "modern" period after 1940.<sup>220</sup> Even this last figure may overstate the frequency of structural relief. The eighty-two modern cases include some in which the monopoly had been brought about in part by merger, and in which divesti-

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217. R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

218. This figure drops to 53% if consent decrees are excluded. *Id.* at 84.

219. *Id.*

220. *Id.*



ture would be particularly appropriate. Only sixty-two of those cases dealt with pure exclusionary practices, unaccompanied by mergers. Of those, just four ended in substantial<sup>221</sup> divestiture, and all four were settled by consent decree.<sup>222</sup> Posner therefore summed up his conclusions as follows: "I have found no contested case involving exclusionary practices only in which substantial divestiture was ordered."<sup>223</sup>

#### IV. THE STATUS OF THE CORPORATION AS A "PERSON"

The small number of divestiture orders is somewhat surprising. They would not, of course, be appropriate in every monopolization case. Still, however, considering the utility of structural remedies, plus the reasonably permissive standards for their use, one would expect to find more of them.

There are several possible explanations for this phenomenon. Some of the cases studied by Professor Posner date from periods when judicial remedies were less flexible than they are today. Others must have dealt with situations that conduct remedies would have been perfectly effective in curing. In still other cases divestiture might actually have been appropriate, but the judge was left unconvinced by poor trial preparation on the relief aspects of the case.<sup>224</sup> And in some cases the government may have made its case properly, but was denied a structural remedy as a result of undue conservatism on the part of the trial judge.<sup>225</sup>

This section will examine one additional and perhaps more persuasive explanation for the rarity of structural relief. It suggests that antitrust practitioners have been unconsciously influenced by the concept of the corporation as a legal "person." They have therefore tended to think of the corporation as a normative entity, endowed in the same manner as an individual person with the right to a continued and undisturbed existence. This perception appears to be shared by both judges and government prosecutors. It tends to deter them from seeking or granting structural relief, since to do so would require the dismemberment—and hence the "execution"—of the corporate person.

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221. *Id.* at 85. Professor Posner identified "substantial" divestiture in an impressionistic way, excluding divestitures of minor subsidiaries (e.g., one with sales of \$8.5 million) or the dedication of patents to the public. *Id.* at 84 n.9.

222. *Id.* at 85. Consent decrees entail neither an admission nor an adjudication of fault, and so they are generally considered to be unreliable indications of what the law is. They may have somewhat more value than is generally assumed, however, since they presumably reflect the judgment of competent counsel regarding the likely outcome of a trial.

223. *Id.*

224. Judge Wyzanski's law clerk for *United Shoe Machinery* later wrote that the government's proposed remedy was "sketchy, poorly prepared, and failed to come to grips with any of the problems involved." Kaysen, *United States v. United Shoe Machinery*, 99 HARV. ECON. STUDIES 343 (1975). See also Statement of Professor John J. Flynn before the National Commission for the Review of Antitrust Laws and Procedures (1978) (proceedings on file in offices of the Antitrust Division, United States Department of Justice).

225. Several commentators have suggested that judges may be overly fearful of the economic consequences of a "mistake" on their part. See W. SHEPHERD, *THE TREATMENT OF MARKET POWER* 69 (1975); M. FLEMING, *THE PRICE OF PERFECT JUSTICE* (1973). In fact, however, business shows great resiliency in adjusting to changed circumstances.

This is clearly not a correct interpretation of the law. When courts have had occasion to squarely address this issue they have uniformly recognized that the primary interest is that of the defendant's shareholders, not the conceptual interest of the defendant itself as a corporation. This appeared most clearly in the *duPont* litigation:

The effect that a judgment in this case might have upon the lawful interests of the corporate defendants in their separate corporate capacities is of course a matter which the Court should consider in framing a judgment, but in the circumstances of this case it appears to the Court far less important than the interests of the many thousands of stockholders whose rights are directly involved.<sup>226</sup>

The interest of a corporate defendant has been distinguished from that of its shareholders on a number of other occasions as well.<sup>227</sup>

Although courts do not consciously anthropomorphize the corporation, there is some reason to suspect that they do so subconsciously. The influence of language on thought is hard to shake, and the structure of our language is such as to encourage thinking of the corporation as an entity. We speak of "the corporation," for example; we attribute acts to it; and we even make it the defendant in our lawsuits. All of this has apparently led to a certain solicitude for the corporation. Courts frequently speak of the need to avoid unnecessary harshness in a decree. Yet "harshness" is a transitive concept, and it is meaningless except in the context of harshness to something or somebody. The context of these remarks makes it clear that the courts have been speaking about harshness to the corporation. This is a concern that can readily lead to a reluctance to impose structural remedies. This concern, however, is out of place in the field of antitrust law.

This follows from the juridical nature of the corporation. We think of the corporation as "a fiction" or as "a legal person." This is not a single integrated concept, however. It is instead the product of two historically separate schools of thought: medieval canon law and early English statute law.<sup>228</sup> The first of these strands would justify concern for the corporation as an entity, but this strand is largely alien to our legal traditions and should not properly be considered when framing equitable relief. The second strand is sufficient, and this views the corporation in more pragmatic and instrumental terms.

The first strand, which views corporations as immortal legal persons,

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226. *United States v. E.I. duPont de Nemours & Co.*, 177 F. Supp. 1, 13 (N.D. Ill. 1959), *rev'd on other grounds*, 366 U.S. 316 (1961).

227. *See, e.g., United States v. Aluminum Co. of America*, 148 F.2d 416, 441 (2d Cir. 1945) (company not responsible for acts of its shareholders); *cf. United States v. International Boxing Club*, [1959] Trade Cas. ¶ 69,525, at 76,078 (S.D.N.Y. 1959) (corporation under new ownership may not have standing to object to decree against it under prior owners, since the owners were the "real parties in interest" and were now different).

228. These schools of thought are identified and distinguished in Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L. J. 655, 665-66 (1926). The discussion in the text is a preliminary assessment of the subject. This area will require further study before firm conclusions can be drawn.

originated with the political needs of the thirteenth-century Church. At that time Europe was caught up in one of its periodic wars. Beginning with Frederick Barbarossa, the Hohenstaufen kings, heirs to Charlemagne's eastern kingdom, were attempting to unite the continent under the Holy Roman Empire. Their principal opponent was the Papacy, simultaneously angry at the sight of aggressive war and fearful of the influence it would lose if the Universal Church were ever confronted by a universal monarchy. The Popes raised armies for the aid of the nationalist Italian faction—the Guelphs, as opposed to the pro-imperial Ghibellines. They also excommunicated the Hohenstaufens and their adherents. In so doing, however, it was important that only individual enemies be excommunicated, and that the organizational structure of the Church be left intact. Pope Innocent IV therefore propounded the doctrine that ecclesiastic bodies were enduring and were incapable of punishment.<sup>229</sup> They had no independent will, and so could not be excommunicated in their corporate capacity. Only their individual members could be so disciplined. Thus the corporation was seen as something of a pure Aristotelian form. It was nothing more than an intellectual construct, describing the relationship among a group of individuals, but, precisely because it was based on the intangible essence of the thing being described, the construct could not be varied or amended to suit the convenience of the moment.

The tradition under English law was quite different. It was much less scholastic and much more utilitarian. The English law, like the Roman law on which it drew,<sup>230</sup> did not identify the corporation as an entity existing in its own right. Rather, it was a creature of the state. The corporation was created by concession from the sovereign authority. It therefore had such powers, and such limitations, as the sovereign saw fit to give it. This concept of the corporation made political adjustments much easier to carry out. If the state creates the corporations and defines their powers, then it is easier to view the corporation as a device, as a tool of convenience, rather than as a judicial entity. This pragmatic view finds expression in the early statutes, which imposed a variety of special restrictions on corporate activities. After the revolution of 1688 the consent of Parliament was necessary before a company could be granted monopoly privileges.<sup>231</sup>

The English perception of the corporation is not only the most relevant to our own legal tradition,<sup>232</sup> but is also the one most conducive to the use of structural remedies. To the extent that the corporation is a vehicle of convenience, its form can be freely altered when considerations

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229. See INNOCENTIUS IV, COMMENTARIA lib. V, tit. XXXIX, ch. LII (Frankfurt 1570).

230. The Roman law had well-developed ideas about business associations, functionally similar to corporations in some respects, but in no law text was such an association referred to as a *persona*, and still less as *persona ficta*. See Dewey, *supra* note 228, at 666-67 n.15. Rather, the association was intimately linked with the individual persons who had created it.

231. See R. FORMEY, THE HISTORICAL FOUNDATIONS OF MODERN COMPANY LAW 11-22 (1923).

of convenience require. The corporation, for example, can be divided into two separate companies. This course would injure the "corporation" as an entity, but, with the exceptions noted in the next paragraph, that is largely irrelevant. This course would not significantly harm the stockholder interests that are the proper object of judicial concern. The stockholders would still own the same real assets as before. Those assets would simply be changed into a new form—into the stock of a second company if the divestiture is made by spinoff, or into cash if it is made by sale. Thus structural remedies will do no cognizable harm.

This last statement represents the pure theoretical position. It would have to be qualified somewhat in actual practice. In reality the shareholders would suffer some actual costs as the result of a corporate breakup. There would be a transaction cost in carrying out the change; a possible loss of business efficiency that could diminish the value of the stock; and a loss of individual freedom in the sense that the shareholders are deprived of the right to organize their business as they please.<sup>233</sup> These costs may not often be particularly large, but they are certainly real enough. This means that a corporation cannot be broken up on a bare assessment of the marginal utility of that change. The principal point, however, is that these are costs to the shareholders, not to the corporation. Concern for the corporation should not have great weight in these cases.

With this observation, the discussion of the current law on structural relief has been concluded. The remainder of the article will examine ways in which this law might be altered or expanded. That examination will begin with the basic policy question of whether any greater use of structural remedies would be desirable. It is to that question that we now turn.

## V. WOULD A GREATER USE OF STRUCTURAL REMEDIES BE DESIRABLE?

There is much dispute over whether it would be desirable to increase the use of structural remedies at all. Some believe that this change would lead to increased competition and lower prices, while others believe that it would hinder efficiency and thus lead to higher prices. This section will outline the arguments bearing on that fundamental question.

The considerations dealt with here are primarily economic rather than legal. They are part of a separate body of learning that has evolved a considerable literature of its own. A final resolution of this policy question is therefore beyond the scope of the present article. The article will instead attempt only to list the principal arguments that have been made for and

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232. American jurisprudence has generally followed the English model. This is illustrated by the pragmatic way in which corporations have been held to be, and not to be, "persons" for various purposes. *Compare* *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938) (corporations are persons within meaning of due process clause) *with* *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868) (corporations are not "persons" for purposes of privileges and immunities clause).

233. These possible costs are discussed in greater detail in the text accompanying notes 173-80 *supra*.

against structural remedies and to give some indication of the factors that should be weighed when reaching a decision.

Increased reliance on structural relief might be favored for several reasons. First, it may be more likely to be effective. If the new industry structure contains enough firms to make anticompetitive conduct either difficult or unlikely of profit, then a defendant would find it hard to engage in such behavior even if he were prepared to violate the terms of a conduct injunction.<sup>234</sup> Second, a structural remedy may be more difficult to evade. A company under a specific conduct order is always free to adopt some alternative anticompetitive practice, with no penalty other than that which awaits him at the end of a new and separate litigation, but a remedy that has altered the basic industry structure may effectively preclude a wide range of undesirable practices. Third, over a time a structural remedy may be relatively easy to administer. Once in place the remedy should police itself through natural market forces, and should not later draw the Commission into the task of monitoring industry conduct. Fourth, a structural remedy can take effect relatively quickly, whereas it may be many years before a conduct injunction can restore full competitive conditions.<sup>235</sup> Fifth, and finally, structural remedies may help to advance the social and political goals that may be a part of the agency's mission. Such remedies will by definition increase the number of independent firms in a given industry, and will thereby tend to foster such values as economic pluralism, dispersion of power, and the creation of institutions of comprehensible scale.<sup>236</sup>

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234. A great many studies have traced the relationship between industry concentration and firm profitability. They have generally found a weak but persistent positive correlation. See Weiss, *The Concentration-Profit Relationship and Antitrust*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (1974) [hereinafter cited as *INDUSTRIAL CONCENTRATION*]. These studies suggest that reducing industry concentration would tend to increase competition. In a more competitive industry, it might be more difficult to achieve effective collusion or to exclude or discipline sufficient numbers of rivals to restore effective market power.

235. See *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 251-52 (1968) (after 10 years, a conduct order had not restored competition; divestiture then required). Some have suggested that legally objectionable monopoly situations arise only through exclusionary practices, rather than true entry barriers, and so can be cured by conduct orders without the need for divestiture. See, e.g., R. BORK, *THE ANTITRUST PARADOX* 329 (1978). There are two reasons why this conclusion may not be correct. First, the market power may require a significant time to erode, a possibility Professor Bork recognizes. *Id.* at 311. Second, entry barriers may arise through market failures, such as the so-called "first mover advantage," which prevent the market power from eroding at all. This last concept is explored in O. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 216-18 (1975).

236. It should not be thought that this last benefit of structural relief is a new discovery. Some of the earliest decisions under the Sherman Act have an eerily contemporary ring to them. One of these cases involved the merits of a Sherman Act claim, rather than the relief to be ordered, but it invoked many of the same values that are often referred to today by the advocates of structural remedies:

If it be true that size and power, apart from the way in which they were acquired, or the purpose with which they are used, do not offend against the law, it is equally true that one of the designs of the framers of the Anti-Trust Act was to prevent the concentration in a few hands of control over great industries. They preferred a social and industrial state in which there should be many independent producers. Size and power are themselves facts some of whose consequences do not depend upon the way in which they were created or in which they are used. It is easy to conceive that they might be acquired honestly and used as fairly as men

This is not to say, however, that there is universal agreement on the desirability of structural relief. At least four arguments have been made suggesting that structural relief may be undesirable in some or all cases. First, structural relief may impose unnecessary transaction costs<sup>237</sup> under circumstances in which conduct injunctions would have been perfectly effective within a reasonable period of time. Second, it may lead to higher prices by subdividing firms to a point below the threshold of efficient size.<sup>238</sup> Third, it may penalize innocent third parties such as the creditors or shareholders of the companies that are reorganized. Finally, it may diminish the incentive that firms have toward growth and vigorous competition.<sup>239</sup>

The following two sections do not attempt to resolve these general issues. Rather, they assume that structural relief may be an appropriate remedy in certain specific circumstances. The sections then examine legal theories that might be applicable in those instances. The first section will explore the use of structural remedies in conjunction with structural theories of liability. This discussion will focus specifically on the use of divestiture as a remedy in no-conduct monopoly actions. The second section will then consider whether structural remedies can be legally appropriate relief in situations involving collusive conduct among oligopolists.

## VI. THE USE OF STRUCTURAL REMEDIES IN CONNECTION WITH STRUCTURAL THEORIES OF LIABILITY

The use of structural remedies might first be increased in conjunction with structural theories of liability. These theories would permit a legal violation to be found solely (or primarily) on the basis of a defendant's market share. Since the violation in that case would be structural, it would be simplest and most natural for the relief to be structural as well.

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who are in business for the legitimate purpose of making money for themselves and their associates could be expected to use them, human nature being what it is, and for all that constitute a public danger, or at all events give rise to difficult social, industrial, and political problems.

United States v. American Can Co., 230 F. 859, 901 (D. Md. 1916).

237. These are the costs related to changing corporate structures and established patterns of dealing.

238. Since the scale economies or other efficiencies related to management, research, or access to capital markets may be difficult to measure, some believe that the prudent course is to assume that successful companies are successful precisely because they are realizing such efficiencies. See McGee, *Efficiency and Economies of Scale*, in *INDUSTRIAL CONCENTRATION*, *supra* note 234, at 55; R. BORK, *THE ANTITRUST PARADOX* 74 (1978). But see Scherer, *Economies of Scale and Industrial Concentration*, in *INDUSTRIAL CONCENTRATION*, *supra* note 234, at 16. Indeed, it has been argued that whatever correlation exists between industry concentration and firm profits may not reflect a casual relationship between the two. Rather, both the size and the profitability of the leading firms may be due to a common third factor, namely their ability to provide superior products at lower prices. See, e.g., R. BORK, *THE ANTITRUST PARADOX* 192 (1978); Demsetz, *Two Systems of Belief About Monopoly*, in *INDUSTRIAL CONCENTRATION*, *supra* note 234, at 164.

239. See K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES* 109-11 (1976). For an analysis indicating that disincentive effects will not be unacceptably great—at least not if divestiture is limited to instances of substantial and persistent market power—see 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 662 (1978).

The discussion of this approach will be divided into two principal subsections. The first subsection will examine the legal basis for the proposed theory. The second subsection will then consider whether such a purely structural approach is consistent with the limitation of section 5 to unfair "methods" of competition.

#### A. *The Legal Basis*

A structural approach to competition cases would begin with a structural theory of liability. In other words, liability would be premised primarily on the defendant's market power. Market power would in turn be deduced from such circumstances as the defendant's market share, changes in market shares over time, height of entry barriers, and so forth. Market power could also be deduced from an inquiry into the defendant's performance, ascertaining such facts as his rate of profit or (possibly) his degree of internal inefficiency. Little if any inquiry, however, would be made into actual conduct.

The structural liability theory that is closest to acceptance is that of no-conduct monopoly. Under this theory, governmental intervention would be appropriate, whether or not reprehensible conduct is shown, whenever substantial and persistent market power exists, unjustified by patents or efficiencies of scale, and is unlikely to be eroded by market forces within a reasonable period of time.<sup>240</sup>

A no-conduct theory of liability might come into use in a number of ways. It may be that it is already implicit in the section 2 monopolization cases, and needs only to be openly articulated.<sup>241</sup> Even if not already present in section 2, moreover, the theory might be justified under section 5 of the FTC Act as a means of enforcing the spirit of the Sherman Act.<sup>242</sup> Finally, the theory might be established through legislation, as some current proposals would do.<sup>243</sup> This listing is intended only to suggest some of the possibilities; a full treatment of the legal appropriateness or the

240. See Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512 (1972), cited with approval in Statement of Alfred F. Dougherty before the National Commission for the Review of Antitrust Laws and Procedures (1978) (proceedings on file in offices of the Antitrust Division, United States Department of Justice).

241. Two noted scholars have concluded that this is probably the case. See 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* 63-64 (1978). At least one lower court has recognized this possibility, although not attempting to pursue it. See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 343 n.1 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Other cases have noted, in a similar but somewhat less expansive vein, that the burden of proof may shift to the defendant once the government shows that he possesses a certain degree of market power. See *United States v. Grinnell Corp.*, 384 U.S. 563, 576 n.7 (1966) (leaving the question open); *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945) (dictum). But cf. *United States v. United States Steel Corp.*, 251 U.S. 417, 451, 460 (1920) (unexerted market power not an offense).

242. The Sherman Act serves two basic policies: eliminating monopoly power while, at the same time, preserving competitive incentives. A no-conduct theory of the sort described in the text may well achieve an appropriate balancing of these two policies in cases of substantial, persistent monopoly power. For an example of a § 5 case applying the spirit of the Sherman Act in another context, see *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 369-70 (1965).

243. See generally, REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 141-63 (1979).

economic merits of the no-conduct approach is beyond the scope of this article.

Assuming that liability has been shown under a structural theory, such as no-conduct monopoly, then relief would most logically be structural as well. This approach is justified both by authority and on principle. It is justified by authority in the sense that it is analogous to the merger and holding-company monopoly cases that were discussed in a previous section.<sup>244</sup> The merger cases used divestiture to undo an improper acquisition; the holding-company cases used it to dissolve an improperly-formed cartel; and the remedy here would use it to terminate an improper monopolistic situation. In each case, in short, the divestiture would be used to directly undo a structural violation of the antitrust laws.

Structural relief would be justified on principle as well as on authority. A remedy must correct the essential elements of the offense at which it is directed. To the extent that the theory of violation was based solely or primarily on the defendant's market power, only a remedy that reduces that power will address the essential elements of that offense. Changes in an industry's structure will often have the intended effect, but changes in conduct may affect market power only after a period of years, if at all, and for that interval would leave an adjudicated law violation in full and uncorrected existence.<sup>245</sup> Relief that merely changed some aspects of a firm's performance—such as its prices or profit rates—would also be open to objection. Such measures could indeed take effect at once and could, in theory, offset the consequences of a bad structural situation. Judicial regulation of this sort is apt to be administratively unfeasible, however, and would require a greater intrusion into market mechanisms than would be wise.<sup>246</sup> Hence, the relief under a structural no-conduct theory is best confined to adjustments in the market structure that was the original source of the violation.

The "pure" situation described in the previous pages will become somewhat more complicated as conduct evidence comes to play a larger role in the theory of liability. Presumably some slight element of conduct can be shown without altering the basically structural nature of the action. Relief would still have to be structural to address the central elements of

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244. See text accompanying notes 45-60 *supra*.

245. The slow pace at which conduct injunctions may change market structure is illustrated by the *United Shoe Machinery* litigation. See text accompanying notes 76-86 *supra*. It is illustrated even more strikingly by the litigation surrounding IBM's manufacture of tabulating cards. In 1936 the Supreme Court affirmed an order enjoining IBM from tying the purchase of these cards, in which market IBM held 81%, to the lease of its calculating equipment. *IBM v. United States*, 298 U.S. 131 (1936). This relief proved ineffective, and IBM signed a consent decree in 1956, providing for divestiture unless its share of the market fell below 50%. See *IBM v. United States*, [1956] Trade Cas. ¶ 58,245 (S.D.N.Y.). Conduct relief failed to reduce the market share to the stipulated level, and after seven years—nearly 30 years after the original decree—divestiture was finally ordered. See *United States v. IBM*, [1963] Trade Cas. ¶ 8824.46 (S.D.N.Y.).

246. This approach may also be undesirably indirect. Persistently high profits, for example, are likely to be a symptom of some underlying competitive problem, which may be best cured by addressing it directly. Regulation may only be preferable in cases of true natural monopolies.



the offense. Beyond a certain point, however, the conduct elements may become so important that conduct-oriented injunctions would become a valid alternative form of relief.<sup>247</sup> In that event the case can no longer be treated as one resting on purely structural theories, and relief will have to be selected in accordance with the principles described in the following section on remedies for conduct violations.

The exact point at which the legal theory changes its character is not clear. For present purposes, however, it is probably unnecessary to resolve that issue. It is sufficient to note that there exists a spectrum of liability theories, some of which are clearly structural. As to them, at least, structural remedies will be appropriate.

#### B. *Authority Under Section 5*

Even if appropriate on general principle, however, pure structural cases may not be authorized under the specific mandate of section 5. That statute declares "unfair methods of competition" to be unlawful, and empowers the Commission to enjoin them.<sup>248</sup> It will be observed that this language speaks only of "methods" of competition, which suggests a ban on improper actions rather than on undesirable structure. The purely structural case may therefore be outside the scope of section 5.

This argument, while probably not, as will be shown below, the best reading of the statute, was recently made by a commentator relying primarily on the original legislative debates.<sup>249</sup> Those debates, the commentator argued, indicate a conscious intention to limit section 5 cases of anticompetitive conduct.<sup>250</sup> In the view of the legislators it was unnecessary to address structural problems directly. Bad structure could be brought about only by bad conduct and, as a result, if conduct were kept within fair limits the industrial structure would remain competitive and self-policing.

This interpretation does have substantial support in the legislative record. The final report of the House Conference Committee, for example, which was quoted in an earlier section, deserves to be repeated in this context: "It is now generally recognized that the only effective means of establishing and maintaining monopoly, where there is no control of a natural resource as [or?] of transportation, is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition."<sup>251</sup> Senator Hollis, a frequent participant in the

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247. This may be true, for example, when the theory of liability stated that a certain kind of exclusionary conduct was improper if engaged in by a dominant firm.

248. 15 U.S.C. § 45 (Supp. I 1977).

249. Kruse, *Deconcentration and Section 5 of the Federal Trade Commission Act*, 46 GEO. WASH. L. REV. 200 (1978). A similar conclusion is reached in 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 306 (1978), although without extensive analysis.

250. Kruse, *supra* note 249, at 211-20.

251. H. R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 18-19, *reprinted in* 51 CONG. REC. 14924 (1914). Even this language may not weigh heavily against the structural case. Conduct orders may have

legislative discussions, spoke in a similar vein: "Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor."<sup>252</sup> J. B. Clark, a leading economist of the day and a witness at the congressional committee hearings, also believed that a ban on unfair competitive methods would be sufficient to ensure competitive conditions. If small firms were free from fear of predatory retaliation, they could compete effectively, in his opinion, and the threat of losing market share would at least force the major firms to price at a level that would not attract new entry.<sup>253</sup> Hence, section 5 could be read literally, and could be held to reach only active "methods" of competition, without generally disappointing the expectations of its original sponsors.

Similar beliefs appear in early case law. In the original *Standard Oil* decision, the following passage appears: "Monopoly would inevitably be prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted."<sup>254</sup>

The early history does not tell the entire story, however. The subsequent case law has expanded the role of section 5 beyond the approach that may have first been contemplated. Six lines of authority now make it reasonably clear that structural cases will be permissible under section 5. Those arguments will be reviewed below, albeit only in a skeletal and preliminary fashion.

The first point to be made is that the statutory reference to "methods" of competition does not have an independent substantive significance. It does not imply a conduct-oriented rather than structural case. As section 5 was originally drafted it referred only to "unfair competition." A number of Senators observed that the phrase already had a recognized and limited meaning at common law—that of passing off the goods of one company as the products of another. Senator Reed feared that this precedent would jeopardize the future of the new section 5:

It is my opinion that if we employ the term "unfair competition" as it is employed in this bill, without adding anything to it, the courts will adopt as the meaning of Congress that meaning which has been affixed to the term by all of the law dictionaries and by a great many legal authorities.<sup>255</sup>

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been contemplated in order to keep a monopoly from coming into being, but structural orders may still be appropriate in dealing with those that already exist; the conduct order alone may be too slow in effecting a cure.

252. 51 CONG. REC. 12146 (1914) (remarks of Sen. Hollis).

253. See J. B. CLARK & J. M. CLARK, *THE CONTROL OF TRUSTS* 27 (2d ed. 1912); cf. W. WILSON, *THE NEW FREEDOM* 201-16 (1913). For other indications that § 5 contemplated only conduct violations, rather than structural ones, see 51 CONG. REC. 11455 (1914) (remarks of Sen. Newlands); *id.* at 12732 (remarks of Sen. Hughes).

254. *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911). If a monopoly were established, however, the *Standard Oil* Court would be willing to use structural remedies in order to cure it. For a general discussion of early thinking on monopoly policy, concluding that the Sherman Act was first visualized as reaching trade restraints rather than structure, see *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

255. 51 CONG. REC. 12936 (1914) (remarks of Sen. Reed).

The solution to this problem was proposed by Senator Hollis:

If the junior Senator from Missouri is right in his claim that the words "unfair competition" . . . [are] applicable only to cases of the substitution of one man's goods for another's . . . I suggest . . . that the words "unfair" and "competition" be separated by some word that will not do them any harm, such as "oppressive" or "methods of" so that there will not be a particular label that has been attached in many cases . . . .<sup>256</sup>

An amendment to this effect was eventually adopted.<sup>257</sup> The circumstances of its adoption thus make clear that the reference to "methods" of competition was intended to broaden, not narrow, the reach of section 5, and in particular did not create any limitation to active conduct.

This leaves us then with the word "competition." Does the original phrase, "unfair competition," have any similar implication of active conduct? A second line of argument would suggest not. The Congress may indeed have expected that conduct orders would be sufficient to achieve the Commission's objectives. Congress may not have thought that a monopoly could exist that was neither maintained by exclusionary conduct nor justified by true superior efficiency. Such a situation was apparently not commonly or ever recognized by the economic knowledge of the day. But Congress certainly did not affirmatively forbid a challenge to such monopolies if they were ever encountered. Congress' ultimate concern was with the public interest and with the elimination of unjustified monopoly power. Senator Cummins, one of the principal sponsors of the FTC Act, observed that there "can be unfair competition in which the public is interested without any [bad] intent . . . ."<sup>258</sup> Our reading of the statutory term should therefore reflect this underlying purpose.

A third argument would refer to the line of cases discussed in the opening section of this article. They held that the Commission's remedial power includes the use of divestiture and other structural remedies. This is so even though section 5 technically authorizes only the issuance of "an order requiring such [respondent] to cease and desist . . . ."<sup>259</sup> The Commission was intended to cure a range of competitive ills, and "Congress must have intended to give it authority that was ample to deal with the evils at hand."<sup>260</sup> When divestiture is necessary to correct the problem, therefore, the power to order it will be implied in even the conduct-oriented remedial provisions of section 5.

The Commission's substantive powers, like its remedial ones, are phrased in conduct-oriented terms. The Commission is directed to prevent unfair "methods" of competition. Since this provision appears in the same statutory section as the authorization for cease and desist orders, it would

256. *Id.* at 12145 (remarks of Sen. Hollis).

257. See H. R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. (1914).

258. 51 CONG REC. 13311 (1914) (remarks of Sen. Cummins).

259. 15 U.S.C. § 45 (b) (Supp. I 1977).

260. *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 312 (1963) (construing analogous provisions of CAB statute).

be most logical to give the two parts of section 5 a consistent construction and hold that both contemplate the possibility of structural litigation. A theory of liability based solely on industry structure should also be proper under section 5.

A fourth line of cases holds that section 5 will reach all violations of the letter of the Sherman Act. This is so even though the legislative history quoted above might seem to suggest different coverages for these two statutes.<sup>261</sup> Some commentators have suggested that section 2 of the Sherman Act will support both a theory of no-conduct monopoly and the act-of-monopolization theories that are presently used.<sup>262</sup> If such a case can be brought under section 2, therefore, it can also be brought under section 5.

A fifth line of cases holds that section 5 can be used to reach conduct that is generally similar to a Sherman Act violation, but that does not come within its literal terms. The conduct may constitute an incipient violation of the Sherman Act,<sup>263</sup> or it may violate the underlying spirit of the Act.<sup>264</sup> In either case it can be reached under section 5. To the extent that a structural liability theory can be cast in either of these terms, therefore, it will again come within the scope of the FTC Act.<sup>265</sup>

A sixth line of authority appears in scholarly commentary, but does not seem, as yet, to have been adopted by the courts. The commentators point out that an action under section 5 is inherently less damaging to a respondent than an action under the Sherman Act. Criminal penalties are not imposed, for example, nor are treble damages. The Commission, moreover, is limited by its obligation to advance the general interests of the public rather than the parochial interests of a private litigant. For these reasons it should be fair to recognize a wider range of violations under section 5 than would be proper under conventional antitrust statutes.<sup>266</sup> This principle may also help the Commission to justify the use of structural theories of liability.

## VII. THE USE OF STRUCTURAL REMEDIES IN CONNECTION WITH CONDUCT THEORIES OF LIABILITY

The use of structural remedies is most clearly appropriate in

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261. See, e.g., *FTC v. Cement Inst.*, 333 U.S. 683, 690 (1948).

262. See 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 614-23 (1978). Areeda and Turner first point out that the language of § 2 does not necessarily preclude a no-conduct theory. Although the statute uses the active voice in condemning corporations that "monopolize," this requirement for conduct might be satisfied by showing any affirmative business act, such as the making of sales, rather than an act that is specifically exclusionary. The authors then conclude, for policy reasons, that a no-conduct theory should actually be adopted by the courts, subject to various defenses.

263. *Fashion Originator's Guild v. FTC*, 312 U.S. 457, 466 (1941).

264. *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 369-70 (1965).

265. Even if the Areeda and Turner thesis described in note 262 *supra* is not accepted—and the Sherman Act is not held to directly incorporate a theory of no-conduct monopoly—such a theory might still be justified as one based on the underlying spirit of that Act.

266. See 2 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 307b-307f (1978). The basic "fairness" to respondents should be emphasized, since the absence of ethical or due process difficulties will make it easier to resolve an ambiguous statute in the direction of broader coverage.

conjunction with structural theories of liability. Divestiture will sometimes also be warranted, however, in response to liability established under the more familiar conduct theories. This use of the structural remedy may actually prove to be the more important of the two, since conduct cases are apt to considerably outnumber those, if any, that are brought on purely structural grounds.

Within certain limits this is already the law. Conduct violations of certain specialized types have already been held to justify divestiture. The doctrine depriving defendants of the fruits of their violations is one instance of this approach, for example, and the doctrine allowing structural relief in the case of recidivists is another.

There may also be another and more common circumstance in which the structural remedy would be appropriate. That is the situation of collusion among oligopolists. Although this particular offense involves conduct, conduct injunctions may not be adequate to cure it in every case. The ordinary conduct remedies for collusion are injunctions, criminal sanctions, and treble damages. Under current practice, however, those sanctions may not be fully effective deterrents to future collusion.<sup>267</sup> A structural remedy may prove to be more effective. Not only does it have a deterrent value, but it may also reduce the firms' inherent power to collude in the future.

Conduct injunctions are sometimes too narrow, and members of the oligopoly will remain able to continue colluding through the use of some mechanism other than the one that was discovered and enjoined, or they may resort to the more subtle devices used to facilitate tacit collusion.<sup>268</sup> A divestiture order may make such a continuation more difficult. By deconcentrating the industry it will increase the number of firms, thereby making coordination among them more difficult and successful collusion less likely.<sup>269</sup> Moreover, in addition to ending an artificial restraint upon competition, the divestiture remedy may go further and succeed in affirmatively increasing it. Hence, structural remedies may be necessary in order to secure the most effective relief.<sup>270</sup>

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267. See K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES* (1976).

268. Some of the many possible mechanisms for accomplishing this end are listed in a Justice Department memorandum, *A SECTION 1 APPROACH TO SHARED MONOPOLY PROSECUTION—FACILITATION DEVICES*, CCH TRADE REG. REP. No. 345 (August 8, 1978). These same devices may also tend to result in supracompetitive prices without any actual agreement or conspiracy.

269. One's acceptance of this point will be influenced to some extent by one's view of the economic debate outlined above in section V *supra*. It should be noted, however, that the point being made here is not precisely the same as the one outlined above. The economic debate considered whether, in general, supracompetitive pricing could be reliably predicted in concentrated industries. Here, however, we have a situation where collusion has actually been found. Hence, a certain predisposition toward it can now be fairly assumed, and the remedies adjusted accordingly. There have been some judicial decisions, moreover, that seem to accept the basic argument that reducing concentration may increase competition. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963) ("Competition is likely to be greatest where there are many sellers, none of which has any significant market share."). Indeed, much of our antitrust legislation may be said to rest on this premise.

270. Structural relief would not necessarily be the most effective in every case. The need for such relief would be greatest when the defendants possess significant market power. This would, of course,

On the basis of these considerations one could conclude that structural relief would be the best remedy for a particular case of collusion among oligopolists.<sup>271</sup> If so, then a series of well-established precedents would justify the imposition of that remedy as a legal matter. It is clear, first of all, that whatever relief is decreed in a given case must be effective.<sup>272</sup> To assure this, another line of cases states that the government, having sustained the burden of proof on the violation, is entitled to have all doubts on the remedy resolved in its favor.<sup>273</sup> This would tend to support the use of structural decrees because they will almost always work. The resulting remedy should also be one that minimizes the need for judicial supervision, which again suggests a preference for structural remedies.<sup>274</sup> The Supreme Court, although often expressing deference to the trial court's selection of a remedy,<sup>275</sup> has not hesitated to revise decrees to include divestiture terms when it thought they were necessary.<sup>276</sup>

Once the Commission has decided on the need for a structural remedy in accordance with this line of reasoning, the propriety of actually ordering it would appear to be reasonably clear. The circumstances for denying structural relief—discussed above in section II—will generally be inapplicable. Only one of them may still have some relevance. The divestiture should be no more drastic or sweeping than an effective remedy requires. The remaining grounds for denying structural relief, however,

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be assessed in light of concentration ratios, stability of market shares over time, entry barriers, and similar factors. *Cf.* text accompanying notes 283-84 *infra*.

271. For a differing view, see K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES* (1976).

272. See *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972) (remedy should "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance"), quoting *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1978); *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961) ("courts are authorized, indeed required, to decree relief effective to cure the violation"). See also *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947); *United States v. National Lead Co.*, 332 U.S. 319, 334-35 (1947).

273. See *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 334 (1961) ("it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor"). See also *Hartford-Empire Co. v. United States*, 323 U.S. 286, 409 (1945).

274. See *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 330-31, 333-34 (1961) ("the public interest should not in this case be required to depend upon the often cumbersome and time-consuming injunctive remedy"). See also *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 163 (1948) ("control through the power of contempt is crude and clumsy") (although executing the terms of even that decree placed a considerable burden on the trial court); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186, 189-90 (1944); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 349-51 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *United States v. Pullman Co.*, 50 F. Supp. 123, 136 (E.D. Pa. 1943), *aff'd by an equally divided Court*, 330 U.S. 806 (1947); *United States v. Corn Prods. Ref. Co.*, 234 F. 964, 1018 (S.D.N.Y. 1916) (conduct injunction undesirable because of the "difficulties of proof, the delay, the cumbersome inquiry necessary to ascertain again whether the defendants shall have actually discontinued" the practices).

275. See *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *International Boxing Club v. United States*, 358 U.S. 242, 253 (1959); *United States v. National Lead Co.*, 332 U.S. 319, 334 (1947).

276. See *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 323 (1961) ("we have a duty ourselves to be sure that a decree is fashioned which will effectively redress proved violations of the antitrust laws"). See also *United States v. Crescent Amusement Co.*, 323 U.S. 173, 185-86 (1944). *But cf.* *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 371-79 (1961) (Frankfurter, J., dissenting).

such as harm to shareholders or the presence of practical obstacles to its use, all contain exceptions allowing such relief when it is thought necessary to cure the violation. The present situation is one in which such a finding will have been made. As a result, structural remedies should generally be held appropriate.

This is illustrated by the *Paramount Pictures*<sup>277</sup> litigation. In that case the district court had found a variety of anticompetitive practices on the part of producers, distributors, and exhibitors of motion pictures. The practices included such things as block booking, unreasonable delays before second-run release, conspiracies, and attempts to monopolize. They did not, however, include actual monopolization.<sup>278</sup> The district court dealt with these conduct-related offenses by means of a conduct-related decree, which basically required a system of open competitive bidding for future film releases.<sup>279</sup> The Supreme Court, however, rejected this remedy on the ground that it would involve the courts too deeply in business decisions.<sup>280</sup> The Court, significantly, did not then remand the case for construction of some different conduct decree. It instead indicated that divestiture was "an alternative" to the decree, thus strongly intimating that an order along those lines would be proper.<sup>281</sup> Thus, it appears that the Court contemplated divestiture as a remedy for what was basically a conduct offense.<sup>282</sup>

An action along these lines would be designed, ideally, to deconcentrate an industry to a point at which interdependent behavior becomes improbable. The case would aim to bring the industry's concentration ratio down below some critical value. This then leads to an important operational question: Is there a "tipover point" in terms of concentration below which collusive conduct is improbable?

The data on this question is ambiguous, and few researchers will claim to have arrived at a fully satisfactory solution.<sup>283</sup> Some of the estimates

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277. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

278. *Id.* at 168. The Supreme Court remanded the case for, among other things, a determination regarding whether there may have been actual monopolization in certain specialized submarkets. *Id.* at 172-73. This aspect of the case is not important for present purposes. The discussion that follows, dealing with the alternatives of conduct and divestiture remedies, was described by the Court as "an independent reason" for remand. *Id.* at 174.

279. *Id.* at 161.

280. *Id.* at 162-63.

281. *Id.* at 175. The divestiture would separate the major film studios from the theaters that they owned—an ownership that appeared to underlie many of the preferential dealing arrangements found to exist. The district court had considered divestiture as an alternative to the competitive bidding system, but declined to order it until the latter approach had been tried and found wanting. 334 U.S. at 170.

282. In some respects the *Paramount* case may be a narrower precedent than it first appears. The restrictive practices and the divestitures there were both primarily vertical, and so the decision may be confined to those circumstances rather than establishing a general rule in favor of structural remedies. This seems relatively unlikely. Nothing in the Court's opinion suggests an affirmative intention to restrict the holding, and if vertical restraints will justify vertical divestiture, then horizontal restraints should at least justify horizontal divestiture.

283. One summarized the work in the field as follows:

[T]hrough I produced reams and reams of printout and struggled and struggled and struggled,

that have been made, however, are consistent within a reasonably narrow range. Professor Bain's original study seemed to show a critical four-firm ratio of fifty percent and an eight-firm ratio of seventy percent.<sup>284</sup> A more recent project suggested somewhat lower figures of forty-five and sixty percent, respectively.<sup>285</sup> Thus, while far from definitive, these studies would suggest a reasonable target for enforcement efforts.

### VIII. CONCLUSION

The subject of structural remedies is basic to the development of a sound litigation strategy. The remedial phase is an integral part of any antitrust suit. To the extent that divestiture is necessary to the proper resolution of a case, therefore, it should be litigated from the beginning with an eye to those facts relevant to a structural remedy.

The law on structural remedies is, unfortunately, as sprawling and ill-defined as it is important. Only the high points of the previous discussion can be recorded here. It appears first that divestiture is a remedy that is available to the Federal Trade Commission even though the agency's power is formally limited to the issuance of "cease and desist" orders. Divestiture has been upheld in a number of specific contexts including cases in which it would cure an essential element of the antitrust offense or in which it would deprive a defendant of the fruits or instrumentalities of his violation. Structural remedies have been disapproved where some less harsh form of relief was available and would have been equally effective. The concept of "equal effectiveness" is crucial, however, and in many circumstances it can be argued that only divestiture will be reasonably certain of restoring competitive conditions. This argument is bolstered by the fact that at the relief hearing the government is entitled to have all doubts resolved in its favor. Armed with this authority the Commission might consider the expanded use of structural remedies in certain situations. It might seek the remedy not only in connection with the

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I was never able to come to a convincing solution, and I don't think I have seen a convincing solution. . . . I just don't have any confidence in their details. I do have confidence that, over a wide range, reducing concentration would reduce price-cost margins.

Weiss, from a dialogue reported in *INDUSTRIAL CONCENTRATION*, *supra* note 234, at 243.

284. See Bain, *Relation of Profit-Rate to Industry Concentration: American Manufacturing, 1936-1940*, Q. J. ECON., Aug. 1951, at 65. Similar figures were discovered by White, who found a critical four-firm ratio of 57%. See White, *Searching for the Critical Industrial Concentration Ratio*, in J. GOLDFELD & R. QUANT, *STUDIES IN NONLINEAR ESTIMATION* (1976). Other investigators found the critical four-firm ratio to be 51%. See Rhoades & Cleaver, *The Nature of the Concentration-Price/Cost Margin Relationship for 352 Manufacturing Industries: 1967*, 40 S. ECON. J. 90-102 (1973).

285. See Dalton & Penn, *The Concentration-Profitability Relationship: Is There a Critical Concentration Ratio?*, 25 J. INDUS. ECON. 133, 137 (1976). This study was based solely on firms in the food industry, however, due to the availability of more accurate data there. *Id.* at 136. A more recent study by the FTC's Bureau of Economics examined newly-available data on two-firm concentration ratios. It concluded that price-cost margins increased significantly once the two largest firms controlled 35% of the market. This report suggests that the two-firm ratio is a more reliable predictor of anticompetitive conditions than the four-firm ratio, which in turn suggests that relatively few competitors are needed to keep an industry performing well. See J. KWOKA, *MARKET SHARES, CONCENTRATION, AND COMPETITION IN MANUFACTURING INDUSTRIES* (1978).



traditional monopoly action, but also in connection with structural theories of liability or with conduct theories of liability in oligopolistic industries. If divestiture is needed to cure those violations, the Commission should have the authority to require it. The chances of success in each of these areas will be increased to the extent that the Commission can purge the law of the concept that the corporation is a legal "person."

In considering an expanded use of structural remedies, the Commission should act with care and circumspection, mindful of the risks involved. This caution has appeared in earlier decisions:

In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law . . . . They would not have been given, or allowed to keep, such authority in the antitrust field, and they would not so freely have altered from time to time the interpretation of its substantive provisions, if courts were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power.<sup>286</sup>

At the same time, however, the Commission should remember the ultimate goal of the antitrust laws. Those laws are concerned with maintaining effective competition in the public interest. A violation of those laws must be effectively redressed in order to serve the public interest. The public is entitled to no less:

The key to the whole question of an antitrust remedy is of course the discovery of means effective to restore competition . . . . [C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effects of such a decree on private interests. Divestiture is itself an equitable remedy designed to protect the public interest.<sup>287</sup>

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286. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

287. *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

